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Testing and Tracking in Public Schools

By MICHAEL S. SORGEN*

Sorting Students in School

Racial Isolation in the Classroom

THE United States Supreme Court has made a decisive commitment to the principle that public education "must be made available to all on equal terms."[1] In its aggressive implementation of that principle, the Court has nearly completed the task of delineating the vast remedial resources for dismantling the deliberately segregated schools of the South.[2] In recognition of the pervasiveness of school segregation across the nation, the Court finally agreed to consider in the 1972 term whether the just as extensively segregated school districts of the North suffer the original sin of Dixie's formerly de jure systems.[3]

This daring doctrinal development of racial and educational equality has been accompanied by extensive thought and analysis by educators seeking to conform to the Court's dictates while not diminishing the quality of public education. Researchers have diligently addressed themselves to a number of vital questions, including the extent of racial segregation in American public schools and its effect upon

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1. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

2. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971). One question which remains is whether the federal district court has the authority to consolidate school districts in a metropolitan area to avoid isolation of minority children in the inner city schools. *See, e.g.*, Bradley v. Richmond Unified School Dist., 338 F. Supp. 67 (E.D. Va. 1972), *order stayed in part*, 456 F.2d 6 (4th Cir.), *rev'd in part*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by equally divided Court*, 93 S. Ct. 2773 (1973). *See also* Bradley v. Milliken, 42 U.S.L.W. 2022 (6th Cir. June 12, 1973), which may raise the same question before the Supreme Court in the current term.

3. Keyes v. School Dist. Number 1, 93 S. Ct. 2686 (1973). Again, the Court failed to squarely resolve the issue of *de facto* segregation, although it did establish some very important evidentiary presumptions in dealing with segregated schools in the North. *But see id.* at 2701 (concurring opinion of Mr. Justice Powell).

equal opportunity and student achievement. Perhaps the most noteworthy survey of recent times relating to racial disparitites in education is *Equality of Educational Opportunity*, more commonly known as the Coleman Report.[4] By its finding that "characteristics of facilities and curriculum are much less highly related to achievement than are the attributes of a child's fellow students in school,"[5] the report lent support to the ruling in *Brown* that segregated facilities are "inherently unequal"[6] notwithstanding equivalency in tangible resources. The Coleman Report thus corroborated the philosophical thrust of the Supreme Court's decision that integration is mandated by the goal of equality in education.

The research further indicates that the thrust of the Court's efforts may not be in the arena of most crucial impact for the nation's school children. The public school pupil spends most of his day in a single classroom. Hence, the racial and social composition of his peer group within those narrow confines would seem to be a more significant and direct determinant of the quality of his education than resource allocation or student assignment in the state or school district.[7] Somewhat anomalously, then, the Court has devoted its energies to defining the requirements of equal educational opportunity on the broad scale. In the classroom context, which forms the heart of the child's educational experience, the development of a Constitutional mandate is still at a rudimentary stage.

The Coleman Report itself disclosed that the variations in pupil achievement were more pronounced among those attending the same school than were the achievement disparities from one school to another. In fact, the report found that over 70 percent of the variation in achievement is variation within the same student body.[8] Christopher Jencks, in his independent evaluation of the Coleman Report, also discovered that each school is a microcosm reflecting the disparities of the larger society. Also according to Jencks, students who perform best on standardized tests were often enrolled in the same schools as the students who performed worst; the range of variation within the typical Northern school was about 90 percent of the range for the ur-

4. The report was named after Dr. James Coleman who was principally responsible for its design. OFFICE OF EDUC., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

5. *Id.* at 316.

6. 347 U.S. at 495.

7. See notes 8-10 *infra.*

8. OFFICE OF EDUC., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 296 (1966).

ban North as a whole. The implications are clear. If our objective is really to equalize educational opportunity, we must focus our energies on diminishing disparities within the schools rather than between schools or school districts. As Jencks indicates:

> If by some magic we were able to make the mean achievement of every Northern urban elementary school the same, we would only have reduced the variance in test scores by 16-20 percent. If, on the other hand, we left the disparities between schools untouched but were somehow able to eliminate all disparities within schools, we would eliminate 78-84 percent of the variation in sixth grade competence.[9]

The vast disparities of student achievement within the same school would seem to be conclusive evidence that racial and social composition of the classroom exerts a stronger influence on student achievement than the characteristics of fellow students at the school as a whole. But beyond the elusive goal of equalizing achievement of public school pupils, a still more compelling reason to focus on the classroom emerges from the Supreme Court's primary rationale in *Brown*—the impact of classroom segregation on a child's motivation to learn.[10] The Court emphasized in that landmark decision that minority children were predestined to more limited educational accomplishments so long as they felt the stigma and sense of inferiority caused by their segregation from the educational mainstream.

The United States Commission on Civil Rights asserts that Black children suffer a greater feeling of inferiority when, though attending a predominately white school, they "are accorded separate treatment, with others of their race, in a way which is obvious to them as they travel through the school to their classes."[11] Professor Frank Goodman eloquently describes it:

> If separation from faceless white students in other schools and other neighborhoods on the impersonal ground of residence is damaging to a Negro child's self-esteem, the daily experience of being isolated from white students in his own school on the highly

9. C. Jencks, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 107 (1972) [hereinafter cited as JENCKS]; St. John, *Desegregation and Minority Group Performance*, 40 REV. EDUC. RESEARCH 111 (1970). One comment and analysis of the Coleman Report even concluded that while school integration does not always improve black student performance, classroom integration consistently has the beneficial effect of improving black children's test scores. McPartland, *The Relative Influence of School Desegregation and Classroom Desegregation on Academic Achievement of 9th Grade Negro Students*, 25 J. SOC. ISSUE, 93, 102 (1969).

10. 2 U.S. COMM. ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 41-42, 86-87 (1967).

11. *Id.* at 42.

personal and perjorative ground of ability must be infinitely more so.[12]

Hence, judicial requirements that schools be integrated without a similar redistribution of students within each school may be self-defeating in terms of equalizing educational opportunity.[13] To involve ourselves in school district integration or inter district financing while ignoring the public school child's daily classroom experience is to strain at a gnat and swallow a camel. It is time for rigorous judicial scrutiny of "tracking" or homogeneous ability grouping, the most pervasive cause of racial isolation in our nation's classrooms.

School Classification—The Scholastic Consequences

"Tracking" is the process of identifying and grouping together school children who appear to have similar learning capacities or learning accomplishments for the purpose of providing them a differentiated course of instruction.[14] This process of classifying and labeling children is widely practiced in American school systems, although the term itself is disfavored.[15] The process includes the euphemistically termed "special education" where children considered different from those in the educational mainstream are separated from their peers and removed to special classrooms or even to different school buildings. A child who is deemed of limited learning potential because of a handicap, abnormality, or special educational problem is thus segregated with other children who share the same disability or distinctiveness, e.g., children who are emotionally or physically handicapped or mentally retarded. At the other extreme of the special tracking spectrum we find children considered mentally gifted and thereby presumed

12. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 430 (1972).

13. Hence, the recognition in the 1969 Civil Rights Act that " 'Desegregation' means the assignment of students to public schools *and within such schools* without regard to race, color, religion, or national origin . . . ." 42 U.S.C. § 2000c(b) (1970) (emphasis added).

14. CENTER FOR EDUCATIONAL IMPROVEMENT, UNIV. OF GA., ABILITY GROUPING: STATUS, IMPACT AND ALTERNATIVES (1970) [hereinafter cited as ABILITY GROUPING].

15. Rist, *Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education*, 40 HARV. EDUC. REV. 411 (1970) [hereinafter cited as Rist]. See also W. FINDLEY & M. BRYAN, ABILITY GROUPING 1970 (1971). A 1967 survey of the National Education Association found at the elementary school level that 27 percent of school districts grouped *all* children, 43 percent grouped some and 25 percent reported random grouping. 85 percent of all school districts reported ability grouping at the secondary level. NAT'L EDUC. ASS'N, ABILITY GROUPING RESEARCH SUMMARY (1968).

capable of benefiting from more intensive or more diversified educational experience.

Tracking also includes those evaluation and classification decisions which are more central to the general educational process. Students are tested and graded, promoted and demoted, and assigned to classes and teachers according to the school's best estimates of their academic progress and potential. In secondary school, the entire curriculum is differentiated on the basis of measured academic competence or ability. Students are counselled to take a program suited to their "capacities" whether vocational, general, college preparatory or honors. Such determinations often define not only what the school will try to teach the child and the character of his classmates, but also his role and status in life after he has completed his schooling.

This process of sorting and labeling may be required to some extent by the specialized and differentiated demands of modern society and economy. From the standpoint of the public schools it might be urged that such grouping enables the teacher to adapt the pace and content of instruction to the needs of more students by narrowing the range of abilities within a particular classroom. Furthermore, by facilitating curriculum planning, it should permit the teacher to devote more individual attention to each student.[16] Similarly, the student arguably benefits by having more realistic criteria against which to measure his individual progress; he could experience an enhanced self concept and have improved motivation to learn at his own rate.[17]

The salient feature of the grouping system is that to a large extent it is compulsory. We might ask whether the same purposes might be served as well by giving every student an equal claim on all public educational resources. If pupils in elementary schools were assigned to classes randomly, might teachers then be more apt to respond to children's individual needs rather than expecting all of them to learn at the same rate? If high school students were permitted to design their own

16. M. GOLDBERG, A. PASSOW & J. JUSTMAN, THE EFFECTS OF ABILITY GROUPING 150 (1966) [hereinafter cited as GOLDBERG]. A recent survey by the National Education Association indicates that the majority of teachers prefer to teach classes grouped by ability. *Teacher Opinion Poll: Ability Grouping*, 57 TODAY'S EDUC., Feb. 1968, at 53.

17. Goldberg, *supra* note 15. *See also* W. BORG, AN EVALUATION OF ABILITY GROUPING 101-16 (1964) [hereinafter cited as BORG]. The contention that ability grouping benefits the pupils as well as the teachers would obviate the need to consider potential conflict between the child's interest and the school's. If in fact ability grouping does harm to students placed in lower categories, a more candid review of academic priorities is warranted.

curriculum from among the school's diverse offerings, instead of being segregated into "college preparatory", or "basic" programs, would the student's own choices of desirable classmates and interesting subject matter impel many of them to better academic performance? Given the diversity of aspiration and interest, such a reform might not make students appreciably more equal after they finish school, but surely a volitional system would be more in accord with our egalitarian ideals.

Even proponents of ability grouping must concede that our knowledge of the diverse needs of children is remarkably primitive.[18] School classifications are too often based upon academic skills alone, and even such decisions are highly inaccurate when grouping is done across the subjects of the school curriculum. Groups homogeneous in one field will prove heterogeneous in others.[19] Moreover, given the number and variety of differentiating characteristics among children, and the inability of public schools to devise programs adequately tailored to individual needs, the result is a gross simplification of the differences. Of necessity, then, the schools make crude and incorrect classification stereotypes.

Perhaps because of the rudimentary nature of criteria and techniques with which to make these classification decisions, educational research indicates that homogeneous grouping has little effect on pupil achievement for those in accelerated groups and has often tragic consequences for children relegated to the lower ability strata.[20]

In fact, the manner in which the same school treats different children may be a more significant determinant of pupil performance than the initial criteria for the classification decision.[21] There is, for example, substantial support in educational literature for the hypothesis that low expectancy by the child's classroom teacher diminishes the motivation of children in low ability tracks. The child who receives signals that he is regarded as a school "failure" and who thereby

18. *See, e.g.*, PROBLEMS AND ISSUES IN THE EDUCATION OF EXCEPTIONAL CHILDREN (R. Jones ed. 1971); L. DEXTER, THE TYRANNY OF SCHOOLING: AN INQUIRY INTO THE PROBLEM OF STUPIDITY (1964).

19. ABILITY GROUPING, *supra* note 13.

20. *Id.* at 3; BORG, *supra* note 17, at 102-06 (ability grouping may have motivated bright pupils more fully to realize their potential, but it seemed to have little effect on the slow or average pupils); GOLDBERG, *supra* note 16, at 12. *See also* NAT'L EDUC. ASS'N, ABILITY GROUPING RESEARCH SUMMARY 44 (1968).

21. *See, e.g.*, R. ROSENTHAL & L. JACOBSON, PYGMALION IN THE CLASSROOM (1968); ELASHOFF & SNOW, PYGMALION RECONSIDERED (1971); Rist, *supra* note 15; Rosenthal & Jacobson, *Teacher Expectation for the Disadvantaged*, 28 SCIENTIFIC AM., April 1968, at 19-23.

feels ignored, responds by provoking the teacher and refusing to do assignments. As a result, he fails to develop the social skills which might bring a more positive response.[22] Proponents of ability grouping argue that such placement might heighten the self-esteem of students assigned to lower tracks by relieving them from competition, with vastly superior students. The research, though far from conclusive, suggests the contrary.[23] As Judge Skelly Wright noted in *Hobson v. Hansen*:

> The real tragedy of misjudgments about the disadvantaged student's abilities is . . . the likelihood that the student will act out the judgment and conform to it by achieving only at the expected level. Indeed, it may be even worse than that, for there is strong evidence that performance in fact declines. . . . And while the tragedy of misjudgments can occur even under the best of circumstances, there is reason to believe that the track system compounds the risk.[24]

Based on the hopeless conclusion that "these kids are dumb" and cannot be properly educated, the children are surrendered to a barren, isolated and unstimulating environment which virtually assures that the initial prognosis will prove true. Homogeneous ability grouping as now practiced in many American schools reflects in a sense the belief of teachers and school administrators that children experiencing learning difficulties will never catch up. Accordingly, these school personnel are unlikely to create or develop programs tailored to the needs of individual children.

Educational innovators are now beginning to recognize that a monolithic achievement standard is inadequate for children who desperately need school experience to meet them at their present level. The question should not be whether a child is above or below "normal" achievement in reading, but rather whether he is meeting his own individual learning capability.[25] Instead of concentrating the defeated and stigmatized children in a lower track almost impossible to control, let alone to teach or to inspire, more flexible and diversified techniques must be tried. Interage grouping, where older children who

22. C. JENCKS, THE COLEMAN REPORT AND CONVENTIONAL WISDOM (1970); Comer, *The Circle Game in Tracking*, 12 INEQUALITY IN EDUC. 25 (1972) [hereinafter cited as Comer].

23. BORG, *supra* note 17, at 300-02.

24. Hobson v. Hansen, 269 F. Supp. 401, 491-92 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). *See also* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd* 456 F.2d 1285 (5th Cir.), *cert. denied* 409 U.S. 1013 (1972).

25. Comer, *supra* note 22, at 25-26.

are themselves academic failures are paid to tutor younger children with learning difficulties, is "making a comeback from the days of the one room schoolhouse."[26] This kind of stratified heterogeneous grouping has been of value to both groups of children in a Baltimore experiment.[27] Another rediscovered approach is that of individualized programmed instruction where children with a wide range of abilities learn the same basic skills at different rates within the same classroom by use of prescribed sequential experiences.[28] In still another attempt to modify current classification practices, schools have utilized teams of teachers with different responsibilities, under the leadership of coordinating teachers.[29] All of these experiments involve subtler distinctions among patterns of cognitive development and a great deal more flexibility than current programs which group only students of similar ability.[30] The innovations are based on the premise that children, whatever their background or apparent intelligence, can find stimulation by experiencing success rather than meeting the dead end of determinative competition. These experiments at least attempt to recognize in educational terms the infinite permutations of classroom achievement.

Perhaps even more important, these programs are often of limited duration because they reject the assumption that learning capacity is immutable.[31] They thus stand in stark contrast to the rigid, inflexible and more typical tracking system described by Judge Wright in *Hobson*, whereby track assignments made early in elementary school were essentially permanent for about 90 percent of the students,[32] and the vast majority of those did not take courses outside of their own curriculum.[33] Students assigned to the basic track essentially were relegated permanently to an education more stifling, less stimulating and in most respects inferior to that offered other students.[34]

26. *Id.* at 23.

27. ABILITY GROUPING, *supra* note 14. (highlights conclusions and recommendations).

28. Comer, *supra* note 22, at 23.

29. ABILITY GROUPING, *supra* note 14.

30. Hall, *On the Road to Educational Failure: A Lawyer's Guide to Tracking*, in INEQUALITY IN EDUCATION (1970); Lesser & Stodelsky, *Learning Patterns Among the Disadvantaged*, 34 HARV. EDUC. REV. 546 (1967); Findley, *How Ability Grouping Fails*, in INEQUALITY IN EDUCATION, No. 14, 38-40 (1973).

31. *See* C. SILBERMAN, CRISIS IN THE CLASSROOM (1970).

32. Hobson v. Hansen, 269 F. Supp. 401, 461-63 (D.D.C. 1967).

33. *Id.* at 464-68.

34 *Id.* at 513-14. The significance of the statistical showing of no mobility within classifications is uncertain, however. It may indicate the accuracy of actual assessment and assignment. *See* Smuck v. Hobson, 408 F.2d 175, 187 (D.C. Cir. 1969).

To the extent that there is a relationship between education and social mobility, an inflexible tracking system which ratifies social class stereotypes is basically undemocratic. It is certainly a departure from the American public school ideal promoted by educational reformers in the last century, whereby the school would serve as an object lesson in equality and brotherhood by drawing students from every social, economic and cultural background into the close association of the classroom.[35] As Judge Wright expressed it:

> Even in concept the track system is undemocratic and discriminatory. Its creator admits it is designed to prepare some children for white-collar, and other children for blue-collar jobs. Considering the tests used to determine which children should receive the blue-collar special, and which the white, the danger of children completing their education wearing the wrong collar is far too great for this democracy to tolerate.[36]

The Role of Law

Whether democratic or not in its result, academic ability is a relevant, even fundamental, criterion in virtually every educational system. Moreover, for better or for worse, there are academic differences between students. It is often not irrational for school officials to take such differences into account, for example, by instituting compensatory programs for students who are not performing up to their scholastic potential. Even if it could be shown, however, that homogeneous grouping is not conducive to academic excellence, or that adapting a child's educational experience only to his present level of proficiency stifles his educational growth, an unwise policy is not necessarily an illegal one.

The law intrudes with trepidation into an area such as grouping or grading which lies at the heart of a schoolman's special claim to competence. When a student is discharged from a high school[37] or

35. H. MANN, THE REPUBLIC AND THE SCHOOL; THE EDUCATION OF FREE MEN 8, 32-33 (1957).

36. Hobson v. Hansen, 269 F. Supp. 401, 513 (D.D.C. 1967). Judge Wright's conclusion is supported by considerable research indicating that tracking effectively separates students along socio-economic and racial lines. ABILITY GROUPING, *supra* note 15, at n.56; SEXTON, EDUCATION AND INCOME: INEQUALITIES OF OPPORTUNITY IN OUR PUBLIC SCHOOLS (1961); 2 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 165 (1967).

37. *E.g.*, Barnard v. Inhabitants of Shelburn, 216 Mass. 19, 102 N.E. 1095 (1913) (dismissal of high school student for academic insufficiency). *Cf.* Isquith v. Levitt, 285 App. Div. 833, 137 N.Y.S.2d 493 (1955) (discretion regarding registration for grammar school); Sycamore v. Wickham, 80 Ohio 133, 88 N.E. 412 (1909) (promotion to seventh grade).

university,[38] not as discipline for misconduct but because of demonstrated inability to do the required work, courts are likely to defer to the educators. Similarly, no judge is about to force the University of California to open its doors to all persons who have obtained a high school diploma, or no diploma at all, on a first-come-first-served basis. Standards for educational advancement are essential to every institution and school officials are uniquely well-equipped to evaluate those standards.[39] In the absence of bad faith, arbitrariness or capriciousness, courts will not intervene.[40] As the Court stated in *Connelly v. University of Vermont*:

> The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness capriciousness or bad faith. The reason for the rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge of the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals. It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student.[41]

Although the courts have sometimes reviewed school classification decisions to determine whether a student was treated arbitrarily under the school's operative standards,[42] there is no case in which demonstrated academic ability has been held constitutionally invalid as a criterion for educational selection. The uniform treatment required by the equal protection clause does not prohibit the state or its schools from distinguishing among its citizens.[43] As the Supreme Court noted in *Carrington v. Rash*, "[M]ere classification . . . does not of it-

38. *E.g.*, Connelly v. University of Vt., 244 F. Supp. 156 (D. Vt. 1965) (dismissal of medical student for scholastic deficiency); Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957) (refusal to renew scholarship or permit registration of graduate student); Eddie v. Columbia Univ., 8 Misc. 2d 795, 168 N.Y.S.2d 643 (1951) (rejection of doctoral dissertation).

39. *See, e.g.*, Brown v. Educational Testing Serv., Civil No. C-71-2029 (N.D. Cal., Feb. 1, 1972) (student denied admission to university on basis of test score not deprived of any constitutional right).

40. *See* Wright v. Texas S. Univ., 392 F.2d 728, 729 (5th Cir. 1968); Lai v. Board of Trustees, 330 F. Supp. 904, 906 (E.D.N.C. 1971).

41. Connelly v. University of Vt., 244 F. Supp. 156, 160 (D. Vt. 1965).

42. *E.g.*, Petit v. Board of Educ., 184 F. Supp. 453 (D. Md. 1960); Jones v. School Bd., 179 F. Supp. 280 (E.D. Va. 1959), *aff'd*, 278 F.2d 72 (4th Cir. 1960); Ackermen v. Rubin, 35 Misc. 2d 707, 231 N.Y.S.2d 112 (1962).

43. Starns v. Malkerson, 326 F. Supp. 234, 239 (D. Minn. 1970).

self deprive a group of equal protection."[44]

Indeed, numerous cases have recognized the propriety of educational classifications based solely on academic competence.[45] As the Court declared in *Stell v. Savannah-Chatham County Board of Education*: "[I]t goes without saying that there is no constitutional prohibition against an assignment of individual students to particular schools on the basis of intelligence, achievement or other aptitudes upon a uniformly administered program . . . ."[46] Thus the Court in *Miller v. School District No. 2*,[47] permitted the school district to separate students according to slow or accelerated sections and to center its vocational curriculum at one school for financial or pragmatic reasons.

Even in *Hobson v. Hansen*, the most far-reaching judicial foray into school classification, Judge Wright meticulously pointed out that ability grouping could be reasonably related to the purposes of public education, and that the mere fact of differential treatment would not necessarily offend.[48] It is clear that courts, properly recognizing their lack of competence in matters of education, have been reluctant to challenge scholastic classifications or make judicial determinations of educational needs. It is only where courts have been able to determine that *some* educational need exists, and that school authorites are providing *no* education, that a needs-satisfaction approach has led to judicial action.[49] Otherwise, the classifications are viewed as essentially scholastic decisions, better left to the academicians.

A judicial role has been traditionally found, however, where school practices have resulted in racial disparities or racial separation. Failure to defer to school authorities in such cases can be explained by two factors. First, *Brown v. Board of Education*[50] left undeniably clear its premise that racial separation is morally and philosophically unacceptable and inherently unequal. Largely because of the forma-

44. 380 U.S. 89, 92 (1965). *See also* Avery v. Midland County, 390 U.S. 474, 484 (1968).

45. *See, e.g.*, Youngblood v. Board of Pub. Instruction, 230 F. Supp. 74, 75 (N.D. Fla. 1964); Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957); Pittman v. Board of Educ., 56 Misc. 2d 51, 287 N.Y.S.2d 551 (Sup. Ct. Spec. Term 1967).

46. 333 F.2d 55, 61 (5th Cir. 1964).

47. 256 F. Supp. 370 (D.S.C. 1966). *See also* Goss v. Board of Educ., 305 F.2d 523 (6th Cir. 1962); Board of Educ. v. Clendenning, 431 P.2d 382 (Okla. 1964).

48. 269 F. Supp. at 511-12.

49. *E.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971).

50. 347 U.S. 483 (1954).

tive role of education, the courts have consistently required racial mixture in the schools so as to lay the foundation of a society in which races are not separated, alienated and hostile. Secondly, the willingness of courts to intervene where racial separation occurs can be explained by the implicit recognition that educational separation usually means inferior education for minorities and that the courts are often the only effective vehicle for their right to equality.[51] When those few are a "politically voiceless minority" who have no avenue of redress outside the courts, greater scrutiny must be applied to their disparate treatment. And when their interest is the vitally important one of education, perhaps the most important means available for them to alter their separate status, the courts must not tolerate differential treatment without a substantial justification. Otherwise, state action, adversely affecting the quality of education for only that small group might well escape the political repercussions attendant upon decisions diminishing educational quality for all.

When there is a nexus between school classifications and racial or social class characteristics, the courts have been willing to intrude upon the schoolmaster's domain. When lower income and minority group children are isolated in the lower tracks, these classification decisions might be seen to deny equal protection of the laws to a certain class of individuals. If teachers, unaccustomed to dealing with newly integrated classes, utilize special education programs to rid themselves of "problem children",[52] that classification scheme perpetuates unlawful school segregation. Similarly, where designation of a formerly all black school as vocational and a formerly all white school as college preparatory resulted in continued segregation, the system was deemed unlawful.[53]

In other instances where a showing of systematic racial differentiation has been shown, courts have reviewed the standards or criteria used in assigning students to particular schools or classes.[54] In school

51. *See* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973). *But see* Graham v. Richardson, 403 U.S. 365 (1971); Dandridge v. Williams, 397 U.S. 397 (1970).

52. *See, e.g.*, Moscowitz, *Problem Children in San Francisco Schools*, San Francisco Chronicle, Feb. 23, 1972, at 1, col. 1.

53. Banks v. Claiborne Parish School Bd., 425 F.2d 1040 (5th Cir. 1970).

54. Calhoun v. Latimer, 321 F.2d 302 (5th Cir. 1963) (cannot use personality interview as a basis for transfer with regard to race); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963) (cannot use different transfer rules for Negroes and whites); Dillard v. School Bd., 308 F.2d 920 (4th Cir. 1962) (cannot place Negro pupils on the basis of academic tests not used for whites); Orleans Parish School Bd. v. Bush, 242 F.2d

districts which had previously operated segregated and inferior elementary schools, courts rejected efforts to employ ability grouping or achievement tests as the basis for assignment or transfer of pupils.[55] Such assignments were at best in conflict with the requirement to integrate, at worst a deliberate subterfuge to perpetuate the dual system. The rationale for such a ruling was typically articulated by the district court in *Moses v. Washington Parish School Board*: The objective fairness of assignment of students on the basis of performance disappears when "black students who until recently were educated in admittedly inferior schools are now competing with white students educated in superior schools for positions."[56]

Where classification schemes create disparities of educational opportunity along racial lines, the equal protection clause is the traditional tool for scrutinizing the schools' sorting process. Yet, there is scant legal precedent beyond the regional borders of the South for reviewing school classification practices which create racial imbalances in the classroom. Since *Hobson*, California has become the principal battleground over educational testing, purported academic competence and educational placement. Pending litigation in the federal courts of that state provide a laboratory for the analysis of some quite difficult questions in this still uncharted area of the law. What kind of showing should be required to constitute a prima facie case of denial of equal educational opportunity? How much of an injurious effect must the complainants demonstrate and how is this effect to be measured? To what extent can we borrow a workable analytical framework from cases involving de facto segregation, employment discrimination or jury selection, and adapt it to school classification practices in northern and urban schools? How relevant is the motivation of school officials and how valid are their justifications for various grouping programs? Finally, perhaps the most difficult question is what effect would various available remedies have on the quality of life in our public schools?

156 (5th Cir. 1957) (standards required to guide school board on desegregation transfers).

55. Lemon v. Bossier Parish School Bd., 444 F.2d 1400 (5th Cir. 1970); United States v. Sunflower County School Dist., 430 F.2d 839 (5th Cir. 1970); United States v. Tunica County School Dist., 421 F.2d 1236 (5th Cir. 1970); Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir.), *vacated in part on other grounds*, 396 U.S. 226, 996, *rev'd in part on other grounds*, 396 U.S. 290, 1053 (1970); Green v. School Bd., 304 F.2d 118 (4th Cir. 1962). *See* Green, *Separate and Unequal Again*, in INEQUALITY IN EDUCATION, No. 14, 14-16 (1973) (suggesting that ability grouping is used deliberately to perpetuate segregation).

56. 330 F. Supp. 1340, 1345 (E.D. La. 1971).

The Case Against Tracking

Disproportionate Impact

Systematic academic differentiation of students in our public schools invariably leads to segregated classes, whether it takes the form of special education or ability grouping.[57] Though there is little dispute about the fact of racial separation, the causes are more uncertain, and therefore so are the legal consequences. Whether because of aspiration and interest, different home environment and cultural orientation, or distinctions made by the schools through the criteria and processes of pupil assignment, substantial racial and ethnic isolation in public school classrooms results from school classifications. Obviously, the underlying reason for the situation will be largely determinative of the school district's legal responsibility for it.[58]

California is a good laboratory, both because of the range and diversity of special education and other tracking programs and because of the pendency of litigation contesting the present racial distribution in such programs. Absent a convincing explanation in terms of cultural or racial differences, we would normally expect that actute learning disabilities, exceptional academic talent or other inherent differentiations would be randomly spread throughout the population, irrespective of racial, ethnic or socio-economic background. For example, it would seem surprising if the percentage of children with physical impediments (i.e. blind, deaf and dumb or perceptually handicapped) would be greater for any segment of the school population. The number of minority children with physical handicaps group should approximate the proportion of that group to the total school population. The same would seem to apply to emotional or psychological disturbance or to severe retardation. The conditions are fairly easily diagnosed, and we know of no racial or genetic characteristics which would account for a significant statistical difference from one group to the other.

Our initial suspicions are corroborated by the following chart at least in regard to Trainable Mentally Retarded, Educationally Handicapped and Physically Handicapped.

57. JENCKS, *supra* note 9.

58. In Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 519-20 (C.D. Cal. 1970) the court voided racially discriminatory teaching which was attributed to a number of factors, including: (1) culturally discriminatory tests, (2) assumptions by counsellors and teachers that black children will achieve poorly, and (3) deference to parental requests which favors the more assertive parents of white middle-class children.

Title Chart: Classifications in California Schools[59]

		Spanish Surname	Other White	Negro	Oriental
Mentally Gifted	Pupils	3,168	80,322	2,277	4,769
	Percent	3.5	88.3	2.5	5.2
Educable Mentally Retarded	Pupils	11,476	20,424	12,400	325
	Percent	25.4	45.2	27.5	.7
Trainable Mentally Retarded	Pupils	2,011	6,966	1,373	191
	Percent	18.9	65.4	12.9	1.8
Educationally Handicapped	Pupils	2,532	20,092	2,065	126
	Percent	10.1	80.2	8.2	.5
Physically Handicapped	Pupils	3,410	9,167	1,963	279
	Percent	22.7	61.0	13.1	1.9
Ungraded Continuation	Pupils	296	647	118	3
	Percent	27.5	60.0	10.9	.3
TOTALS School Population	Pupils	712,475	3,294,401	416,801	99,388
	Percent	15.6	71.9	9.1	2.2

		American Indian	Other Nonwhite	Total
Mentally Gifted	Pupils	56	408	91,000
	Percent	.1	.4	
Educable Mentally Retarded	Pupils	243	279	45,147
	Percent	.5	.6	
Trainable Mentally Retarded	Pupils	35	80	10,656
	Percent	.3	.7	
Educationally Handicapped	Pupils	140	106	25,061
	Percent	.6	.4	
Physically Handicapped	Pupils	38	167	15,024
	Percent	.3	1.0	
Ungraded Continuation	Pupils	4	10	1,078
	Percent	.4	.9	
TOTALS School Population	Pupils	17,393	37,668	4,578,126
	Percent	.4	.8	

However, in two categories of special education, both of which rely heavily on intelligence tests for selection,[60] there is a substantial dis-

59. BUREAU OF INTERGROUP RELATIONS, CALIFORNIA DEP'T OF EDUC., RACIAL AND ETHNIC SURVEY OF CALIFORNIA PUBLIC SCHOOLS (rev. ed. 1971) [hereinafter cited as RACIAL AND ETHNIC SURVEY OF CALIFORNIA PUBLIC SCHOOLS].

60. CAL. EDUC. CODE § 6902 (West 1969) specifies a number of factors which must be fully explored before a child may be placed in an EMR class, but the IQ test

porportion in the representation of minority groups. Not surprisingly, these programs for Mentally Gifted Minors and for Educable Mentally Retarded (marginally retarded), often considered the opposite ends of a tracking spectrum, are the subject of much legal ferment and litigation.

One pending case dealing with the classification of Spanish speaking children is *Diana v. State Board of Education,*[61] where the nine plaintiffs and four other children constituted the entire class for the educable mentally retarded (EMR) in the Soledad Elementary School District. Twelve of the thirteen were Mexican-American. Of the approximately 45,000 children in EMR classes in the State of California during the 1966-67 school year, 26 percent were of Spanish surname, while students of this ethnic and cultural background comprised only 16 percent of the state's total public school population.[62] One year and four months after the parties had stipulated to new procedures (including translation of tests into the child's primary language) for the evaluation and placement of Spanish surname children in classes for the retarded, statewide statistics indicated only a slight diminution of the racial disproportion.[63]

The complainants' uncontroverted statistics, adopted by the

is the crucial criterion. CAL. EDUC. CODE § 6902.07 (West 1969) requires that an individual test be administered as a prerequisite to placement in a class for the retarded. CAL. EDUC. CODE § 6902.085 (West 1969) stipulates a child may be considered retarded only if other information "substantiates" the test score. *See* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

61. No. C-70-37 RFP, Stipulation and Order filed Feb. 5, 1970. *See also* Guadalupe v. Tempe Elementary School District, Civ. No. 435 (D. Ariz. Jan. 24, 1972) for a similar stipulated order.

62. RACIAL AND ETHNIC SURVEY OF CALIFORNIA PUBLIC SCHOOLS, *supra* note 59, at table 1. These statistics were uncontested during the litigation.

63. The percentage of Spanish surname children in California public schools on April 30, 1971, was 15.6, whereas their representation in educable mentally retarded classes (EMR) remained at 25.4 percent. RACIAL AND ETHNIC SURVEY OF CALIFORNIA PUBLIC SCHOOLS, *supra* note 59, at table 1. Hence, after extensive review of statistics from the State Department of Education and lengthy negotiations among the parties, a second stipulated settlement was signed and made the order of the court in *Diana* on June 18, 1973. This order, which supersedes the court's prior order of February, 1970, provides a detailed five-year program for alleviating the wrongful placement of Chicano children of normal intellectual ability into classes for the retarded. The consent order recognizes that although many school districts have eliminated the overrepresentation of Chicanos in such classes, a significant variance still exists in some 235 districts out of the 1130 districts in the State. The order then details an affirmative action plan to eliminate the disparity and further remedial action, including the possible cut-off of state funds from those districts which continue to discriminate. Contempt proceedings to enforce that order are presently pending before the district court.

Court in another challenge to the EMR program, *Larry P. v. Riles*,[64] indicate an even larger statewide disparity for black children. Although representing only 9.1 percent of the public school population, blacks comprise 27.6 percent of California's classes for the educable retarded.[65]

A similar showing was made for the San Francisco Unified School District in which the plaintiffs were registered. While only 28.1 percent of students in the San Francisco District were black, more than 60 percent in classes for the educable retarded were black children. The disparity was even greater in the elementary schools where almost 70 percent of EMR children were black, more than twice the proportion of Blacks in the district population.[66] If one looks at the Mentally Gifted Minor program (MGM) where tests of intelligence or scholastic aptitude are also the major determinant of selection,[67] one again finds racial disporportion; minority groups are characteristically under represented in the MGM program designed to ensure a more stimulating, intensive educational experience to its participants. The Oakland Unified School District, for example, which has 60.5 percent black children, 8.5 percent Spanish surname and 24.1 percent "Other white", has a gifted program which is 71 percent white, whereas blacks comprise

64. 343 F. Supp. 1306 (N.D. Cal. 1972) (order granting motion for preliminary injunction).

65. RACIAL AND ETHNIC SURVEY OF CALFORNIA PUBLIC SCHOOLS, *supra* note 59, at table 1.

66. Affidavit of Neal Snyder (Exhibit "C" to Complaint) (Based upon SAN FRANCISCO UNIFIED SCHOOL DIST., RACIAL ESTMATES OF PUPILS ATTENDING SAN FRANCISCO PUBLIC SCHOOLS AND SUMMARY OF ACTIVE ENROLLMENT IN SPECIAL EDUCATIONAL SERVICES PROGRAM (1970)).

67. In general, a child is placed in the MGM program if he/she either demonstrates or is believed to possess such intellectual capacity as to place him/her within the top 2 percent of all students in his grade throughout the state. CAL. EDUC. CODE § 6421(a) (West 1969). IQ tests are exclusively the criteria for children in grades K-6 and are supplemented with achievement scores for grades 7-12. CAL. ADM. CODE tit. 5, § 3821(a), (b). Up to 5 percent of the total number of children placed in the program need not achieve the requisite 132 on IQ tests if selected by teachers and school administrators as "exceptional." CAL. ADM. CODE tit. 5 § 3821(c). Another exception permits up to 2 percent of "culturally disadvantaged" (i.e. prevented from fully developing intellectual and creative ability because of language, cultural, economic or environmental handicap) children in the district to be placed in MGM classes without the administration of an IQ test, but the method of funding by the State Department of Education encourages reliance on the tests. CAL. ADM. CODE tit. 5, § 3822. *See, e.g.*, CAL. EDUC. CODE § 6426 (West 1969). Since a district is reimbursed only for testing children who are successfully identified as "mentally gifted" by scoring well on the tests, there is a disincentive to screen children whose talent is not made obvious by their performance on standardized tests.

only 15 percent and Spanish surname only 3 percent.[68] In San Francisco, where special efforts to recruit minority children into the gifted program have met with some success, the disparity is much less. Blacks comprise 32.3 percent of the total school district and just 19 percent of the gifted classes; Spanish surname children, who constitute 14 percent of the district, are just under 7 percent of those in the gifted classes, and Caucasians as well as Orientals are represented in greater proportion than in the district as a whole.[69] Although reflecting a considerable disparity, these figures put San Francisco barely within the State Guidelines which permit a 15 percent discrepancy.[70]

A related and not atypical situation involving an elitist high school in San Francisco recently became the subject of litigation.[71] The challenge was to the allegedly discriminatory assignment of students to Lowell High School, which is designated and maintained as an exclusively "academic" or "college preparatory" public school. The basis for admission is not standardized tests, but primarily school grades received in the low semester of the ninth grade in junior high school.[72]

68. OAKLAND UNIFIED SCHOOL DIST., APPLICATION FOR PRIOR APPROVAL OF PROGRAM FOR MENTALLY GIFTED MINORS, Aug. 1, 1972 (Report required by CAL. EDUC. CODE §§ 6423, 6426 (West Supp. 1972).

69. *See* Memorandum of William B. Cummings, Supervisor of Programs to Gifted, to Associate Superintendent, San Francisco Unified School Dist., Sept. 14, 1971 (regarding steps to recruit minority students). Statistics are taken from SAN FRANCISCO UNIFIED SCHOOL DIST., MGM RACIAL COUNT, ELEMENTARY SCHOOLS (1970).

70. CAL. EDUC. CODE § 6902.095 (West Supp. 1972) requires each school district to submit an explanation if the proportion of minority children varies more than 15 percent from their representation in the district as a whole. A motion for supplemental relief in conjunction with the San Francisco elementary school integration suit was denied in the summer of 1972. Johnson v. San Francisco Unified School Dist., Civil No. 70-1331 (N.D. Cal., filed July 24, 1972). The motion attacking racial segregation in the gifted program was largely based on the court's language in its previous desegregation orders. In the preliminary order of April 28, 1971, the parties were admonished to prepare plans for the "[a]voidance of use of tracking systems or other educational techniques or innovations without provision for safeguards against racial segregation as a consequence." The final judgment provided in pertinent part: "The Judgment and Decree does not require gifted children to be held back. They may be given special preferences or attention or handling in any manner which does not involve or promote racial segregation." Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315, 1325 (N.D. Cal. 1971). The District was further enjoined from "[a]uthorizing, permitting or using tracking systems or other educational techniques or innovations without effective provisions to avoid segregation." *Id.* at 1322.

71. Berkelman v. San Francisco Unified School Dist., Memorandum Opinion and Order of Summary Judgment, Dec. 19, 1972, *appeal docketed*, Civil No. 73-1686 (9th Cir., filed April 11, 1973).

72. Grades are not the entire criteria for admission, however. Certain courses which must be taken by Lowell applicants during the ninth grade are restricted to

No doubt, Lowell students are furnished "special" educational resources and opportunities. The legal questions raised by this case are similar to those we must consider in evaluating the legality of a separate "college" curriculum at any comprehensive high school, since the only difference is that the Lowell students are physically isolated in a separate school.[73]

The San Francisco District operates the normal type of comprehensive high school to which students are customarily assigned on the basis of residence within the geographical area served by the school.[74] In addition, there are a number of special schools. Opportunity High is a small experimental program designed for students who are not succeeding in the conventional senior high school setting but who are potentially able to succeed. Students interested in attaining a vocational skill as well as a high school diploma attend John O'Connell Vocational High School. Admission to either Opportunity or O'Connell is largely a matter of choice.[75] Samuel Gompers is a nonaccredited high school, serving working students who wish to attend school part-time and foreign born students who do not communicate well enough in English to learn effectively in a comprehensive high school. As somewhat of a "dumping ground" for disciplinary problems and others who are difficult to educate (mostly for language difficulties), Gompers inevitably contains a large proportion of nonwhites.

Finally there is Lowell, a nondistricted academic high school which draws from the entire city rather than from specific districts, as is the case with comprehensive schools.[76] Lowell is open to the 15 percent of the city's total high school population with the best academic credentials. Analysis of the racial composition of the entering class at Lowell for the 1971-72 school year indicates that blacks comprise 7.5 percent and Spanish 5.2 percent of the Lowell student body as contrasted with 25.5 percent and 13 percent respectively on a district wide basis. A review of the schools which Lowell students previously attended demonstrates a direct relation between previous enrollment at a segregated school and inability to gain admittance to Lowell. Four predominantely white junior high schools accounted for well over half

students who have passed prerequisite examinations in the eighth grade. *Id.*, affidavit of Ruth McClane.

73. All numberical data is derived from SAN FRANCISCO UNIFIED SCHOOL DIST., RACIAL ESTIMATES OF PUPILS ATTENDING SAN FRANCISCO PUBLIC SCHOOLS (1971).

74. Berkelmen v. San Francisco Unified School Dist., Memorandum Opinion and Order of Summary Judgment, Dec. 19, 1972 (defendant's answers to interrogatories).

75. *Id.*

76. *Id.*

of all students admitted to Lowell.[77] Moreover, the twenty-seven schools designated by the court in *Johnson v. San Francisco Unified School District*[78] as segregated black schools send a total of ninety-eight students to Lowell in the last entering class, as compared with the twenty-seven segregated white schools which sent more than three times as many.[79]

Despite the absence of school district data on the economic status of its students, the plaintiffs in *Berkelman* did a study based upon distribution of federal money under Title I, the Elementary and Secondary Education Act, since the funds are designated for educational services for children from low income families. The figures showed that the elementary schools with the greatest concentration of pupils from poor families (as indicated by receipt of Title I funds) accounted for the smallest proportion of admissions to Lowell in 1971-72. The finding of economic discrimination was further corroborated by Lowell students' minimal participation in the Federal School Lunch Program, another reliable index of poverty.[80]

Lowell is a public school, but not in the sense that it is open to any student who wants to attend. As in the MGM program, access to privileged schoolmates and stimulating learning is limited to those who meet the competitive criteria for selection. In both cases, we find an elitist academic program primarily populated by children of the dominant culture, a bastion of educational privileges from which minority children and those from the lowest socioeconomic groups are systematically excluded. Similarly separated on the opposite shore of the educational mainstream are special classes for the educable retarded and lower levels of the general tracking spectrum, where minority children are grossly overrepresented.

If tracking is seen as a reflection of the mutations of scholastic merit found in every academic system, then it superficially appears to coincide with basic premise of competitive democracy—every school child should have an equal opportunity to become unequal. But when the tracking system maintains the racially disproportionate distribution of social benefits in our society, then it is indistinguishable in legal terms from any other form of school segregation or racial discrimination.

77. *Id.*

78. 339 F. Supp. 1315 (N.D. Cal. 1971) (the elementary school desegregation case in the same district).

79. *Id.* Exhibit 3 to complaint (uncontroverted).

80. All economic information was obtained through extensive interrogatories.

The Ensuing Harm

In explicit cases of school segregation, there is a presumption that irreparable harm exists regardless of the comparative evidence of test results, teacher salaries, student-teacher ratios, class size or dollar expenditures. Following the mandate of *Brown*, we assume that placing inner-city children from low socioeconomic strata and/or minority ethnic backgrounds together in class with other children similarly convinced of their academic inferiority will not enhance their educational advancement. As the court noted in *Jackson v. Pasadena City School District*:

> The separation of children from others of similar age and qualifications solely because of race may produce a feeling of inferiority which can never be removed and which has a tendency to retard their motivation to learn and mental development. [citing Brown].[81]

The deleterious effect of racial isolation within the same school is still more severe than that of between school segregation.[82] Hence, the rationale of a per se rule that segregation is "inherently unequal"[83] should apply with still greater force. In the classroom, as in the school district, the mere showing of statistical imbalance should suffice to prove an inherent denial of equal educational opportunity. Even absent a traditional case of classroom segregation, the courts have appropriately begun to recognize that homogeneous ability grouping is educationally detrimental to students regularly relegated to the lower tracks.[84]

The most obvious injury is probably to minority children disproportionately assigned to classes for the educable retarded.[85] Given the limited design of such programs to make the children "economically useful and socially adjusted"[86] and the minimal curriculum, placement in such a class can be seen as a lifetime sentence to illiteracy and public dependency. Minimal mobility of minority children from such classes normally assures that classification as "retarded" will endure

81. 59 Cal. 2d 879, 883, 382 P.2d 878, 881, 31 Cal. Rptr. 606, 609 (1963).

82. 2 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 1-4 (1967).

83. Brown v. Board of Educ., 347 U.S. 383, 395 (1954).

84. *See, e.g.*, Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971); Spangler v. Pasadena Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

85. *See, e.g.*, Larry P. v. Riles, 343 F. Supp. 1306, 1308 (N.D. Cal. 1972). *See also* J. Mercer, The Use and Misuse of Labeling Human Beings: The Ethnics of Testing, Tracking and Filing, Oct. 16, 1971, paper presented at Kennedy Symposium on Human Rights, Retardation and Research.

86. CAL. EDUC. CODE § 6902 (West 1969).

throughout a child's educational career.[87] Moreover, the irreparable damage is manifested in stigmatizing notations on a pupil's permanent school record, the low level of teacher expectation and of pupil self-esteem, and the humiliation and sense of inferiority.[88]

The Coleman Report conclusions regarding the relationship between classroom peer group and pupil performance make it doubtful that a marginally retarded child would benefit as much from placement in an EMR class as from remaining in a regular class. Furthermore, if the added financial and educational resources now devoted to EMR were redistributed to normal classrooms, the improvement in overall education might more than compensate for the additional difficulty of dealing with the EMR children in regular classrooms.[89] The school district argument that to place a retarded child in a regular class would subject him to humiliation and failure is the same argument used by southern school districts in resisting desegregation; it gains no persuasiveness in regard to tracking. Even the contention advanced by school authorities that the pace, curriculum and small class size in EMR programs are beneficial to retarded children does not controvert the assertion that the minority student who is mislabeled and inappropriately placed in such a class is harmed thereby.[90]

Undeniably, the deprivation and stigma are less direct and less evident for the minority child denied access to the elite special program at the highest strata of the track system. At least the minority child, though systematically excluded from these special programs, is receiving the kind of public education intended for most of the district's pupils. He is not labeled "special" in a manner which connotes abnormality or limited educability. He is not burdened by the demoralizing recognition that he cannot advance beyond an educationally hopeless status quo. But if the child's educational development is frozen in the immutable

87. The basic track was found to be a rather permanent one in *Hobson v. Hansen* and the evidence indicated a similar pattern in *Larry P.* for EMR placements. The relative lack of mobility of minority students placed in classes for the retarded was indicated in J. CHENAULT, MENTAL RETARDATION AS A FUNCTION OF RACE, SEX AND SOCIO-ECONOMIC STATUS (1970).

88. Bettelheim, *Segregation: New Style* 66 THE SCHOOL REV. 251, 265 (1958) describes the overwhelming isolation of children labeled retarded and how they inevitably "succumb to hopelessness." The difficulty of a retarded person maintaining his self-esteem in light of the "shattering stigma [which] dominates every feature of his life" is discussed in R. EDGERTON, THE CLOAK OF COMPETENCE; STIGMA IN THE LIVES OF THE MENTALLY RETARDED 204-08 (1971).

89. Affidavit of Edward M. Opten, filed Feb. 22, 1972, Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

90. Larry P. v. Riles, 343 F. Supp. 1306, 1308 (N.D. Cal. 1972).

glacier of academic strata, "ice is also great and will suffice"[91] to stifle his creative growth. The average student at the typical comprehensive high school is hardly free to select among the vast array of courses of instruction or to utilize the superior library resources and other facilities at Lowell.[92] The child in a regular classroom does not derive any advantage from the smaller class size, greater individualized instruction, lesser time spent on distractive discipline, or special intensive study opportunities offered in the district's program for the mentally gifted.[93] It makes no difference which group is isolated from the educational center when the less favored group, the victim of academic abnegation, remains the same.

Once again we hear the often repeated arguments of southern anti-integrationists transposed to a new context: it would do a minority child more harm to thrust him into a more accelerated and more competitive educational milieu. If he were unable to handle the work, he could be afflicted with emotional problems, exacerbated in the case of minority children because of less support at home or different peer group interests. Once again, this argument must be rejected. First, the underlying premise of this contention is that quality education is futile for children who, to that point, have been prevented from fully developing their intellectual and creative ability because of some cultural, economic or environmental handicap. It might be assumed equally well that such children may be expected in time and with appropriate curricular modifications to perform at a level equivalent to the most gifted children of the dominant culture. Furthermore, the child unprepared to compete with higher levels of the meritocracy in school will likewise lack the credentials for economic success or for improvement of his social status when he emerges from the public school. To postpone the potential expansion of a child's creative capacity until after school is to cancel it. The result is to perpetuate the class and caste stereotype which characterize children when they first enter the schoolhouse gate. In short, it is to deny equal educational opportunity.

Fear of the remedial ramifications may also make us more insensitive and more unsympathetic to the plight of pupils denied access to

91. Robert Frost argues in *Fire and Ice* that both will suffice for destruction of one's world.

92. For instance, the plaintiffs in *Berkelmen* showed that Lowell offered a choice of nine foreign languages, whereas Woodrow Wilson High School offered only two.

93. *See* SAN FRANCISCO UNIFIED SCHOOL DIST., PROGRAMS FOR THE GIFTED, STATUS REPORT, (1972); OAKLAND UNIFIED SCHOOL DIST., APPLICATION FOR PRIOR APPROVAL OF PROGRAM FOR MENTALLY GIFTED MINORS (1972).

elite academic offerings. Whereas the child harmed by an inappropriate confinement in a class for the retarded or in a low track can simply be removed from that class, the remedy is not so simple for the child previously excluded from an accelerated program. Community opposition would undoubtedly be intense if a court ordered minority and low income children admitted in greater numbers into classes for creative and intellectually superior school children, especially if it means displacing children already there. Even without such displacement there might be a harmful impact on children in the fast track who, seeing themselves as an academic elite, perform accordingly. When more students are assigned to the special program, the distinction diminishes and the reward loses its meaning. The student can no longer feel he is getting ahead because no longer are his classmates so visibly left behind. White parents who view their own children as academically advanced will fight to retain the superior status and learning opportunities. Their latent opposition to integration may well crystalize when they are deprived of separate segregated corners in the newly integrated schools. Similarly, teachers who find more satisfaction working with highly motivated children in stimulating classes will also feel threatened by the addition of children from a different culture.

It may even result that black and other minority children will not succeed in the fast tracks from which they were previously excluded, and that the racial disparity in pupil achievement will be only slightly reduced if at all. Nonetheless, any system of rewards and punishments based on racial differences should be disassembled, regardless of its educational impact. The most important effect of classroom desegregation may well be its long range conduciveness to racial harmony in the society at large, its ability to make diverse racial and cultural groups rethink their relationships to each other. If these groups emerge from newly integrated schools as alien to one another as before, the struggle which commenced with *Brown v. Board of Education* will have been in vain. Judicial resolution of tracking disparities must be based not on speculation as to the academic impact but upon "burden of proof . . . and straightforward moral and constitutional arithmetic."[94]

Shifting the Burden of Proof

Once a substantial racial and economic imbalance in the classrooms is shown, school district officials ought to be required to rebut

94. Hobson v. Hansen, 327 F. Supp. 844, 859 (D.D.C. 1971).

the inference that racial factors caused the disparity[95] and to demonstrate that significant educational benefits far outweigh the resulting racial isolation.[96] If they fail to do either, and if it cannot be shown that the tracking system accomplishes what it purports to do, then there is neither pedagogical nor legal justification for the special class treatment. Those children unjustifiably confined in special classes or lower tracks should then be reassigned to regular classes and provided special assistance to facilitate their reintegration.

In racial discrimination cases, "statistics often tell much, and courts listen."[97] Classifications based upon race have long been viewed with the greatest suspicion.[98] Classifiers who select race as their criterion are faced with the heaviest justification burden.[99] In le-

95. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971) established the presumption in schools that are substantially disproportionate in racial composition. The presumption in *Swann* relates to the propriety of remedy and not to the finding of initial constitutional violation. *See* Fiss, *The Charlotte-Mecklenburg Cases—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 701 (1971); But the Supreme Court has now made it quite clear that a similar presumption arises in determining the legal responsibility of northern school districts. In Keyes v. School District No. 1, 93 S. Ct. 2686 (1973) the Court asserted that once a prima facie case of segregation is made, "it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions . . . were not motivated by segregative intent." *Id.* at 2695. *Cf.* Copeland v. School Bd., 464 F.2d 932 (4th Cir. 1972).

96. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 509 (1969) established a similar burden on school officials to show "material and substantial disruption" before limiting the rights of students to free expression. The Supreme Court in *Keyes* refused to decide whether the "significant benefits" inherent in a "neighborhood school policy" would of themselves justify racial or ethnic concentrations. 93 S. Ct. at 2699. However, there is persuasive language in the concurring opinions of Mr. Justice Douglas and Mr. Justice Powell that even important educational reasons cannot diminish the initial constitutional responsibility to bring about integrated schools. Such factors, if indeed they can be shown by school districts, would more appropriately be considered in framing a remedy. *Id.* at 2700-11.

97. Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972); *accord*, Turner v. Fouche, 396 U.S. 346 (1970); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971); United States v. Board of Educ., 396 F.2d 44, 46 (5th Cir. 1968); Alabama v. United States, 304 F.2d 583, 586 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962). *But cf.* Jefferson v. Hackney, 406 U.S. 535 (1972) where plaintiffs made a statistical showing that the percentage of Negroes and Mexican Americans was greater in AFDC than in other welfare categorical programs and that the State had allocated funds to the other programs which more adequately met the recipients' financial needs. The Court characterized this as a "naked statistical argument" where there were rational bases for the discrepancy and no inference of racial motivation.

98. McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

99. *See* Dandridge v. Williams, 397 U.S. 471, 485 n. 17 (1970).

gal terms, we say that a prima facie case has been established when a clear cut segregative impact is shown.[100] The result is a reversal of the traditional equal protection test in which the plaintiffs must prove the irrationality of a challenged classification. Instead, the burden shifts to the defendants to justify the apparently discriminatory result.

This conceptual approach finds support in cases involving public housing, employment discrimination and jury selection, as well as school desegregation. For example, if a greatly disproportionate number of blacks fail a job qualification test, then the burden shifts to the employer to explain how the test is valid as a criterion for employment.[101] Similarly, where administration of an ostensibly neutral testing device results in large scale exclusion of blacks and low income people from jury lists, the burden shifts to the state to justify the selection criteria.[102] Finally, when a school district's methods of delineating school boundaries result in student bodies that are substantially segregated, the school district must demonstrate the educational relevancy and validity of its methods.[103]

Still unresolved, however, is the quantum of evidence sufficient to shift the burden. In the jury selection cases where the standard is "substantial racial proportion"[104] and infinitesimal mathematical probability that a discrepancy could occur without discrimination was held to establish a prima facie case.[105] In the analogous area of reapportionment for legislative districts, the standard is one person, one vote "as nearly as is practicable."[106] The Court recently allowed as much as 16 percent deviation between districts which was "unavoidable despite a good faith effort to achieve absolute equality."[107] The dissent would have allowed this variation only on a showing that more precise

100. See cases cited note 97 *supra*.

101. Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969).

102. Turner v. Fouche, 396 U.S. 346 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Carmical v. Craven, 451 F.2d 399 (9th Cir. 1971).

103. *See, e.g.*, Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); United States v. School Dist., 151, 286 F. Supp. 786 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968).

104. Turner v. Fouche, 396 U.S. 346, 359 (1970). In *Turner*, the county population was 60 percent black while only 37 percent of those selected for grand or petit juries were black.

105. Whitus v. Georgia, 385 U.S. 545, 552 (1967).

106. Kirkpatrick v. Priesler, 394 U.S. 526, 531 (1969); Reynolds v. Sims, 377 U.S. 533, 577 (1964).

107. Mahan v. Howell, 93 S. Ct. 979 (1973).

equality could not be achieved without jeopardizing some critical governmental interest.[108]

Applying an equally nebulous standard in the school context, the Fifth Circuit in *United States v. Jefferson County Board of Education*,[109] asserted that a "gross discrepancy" from HEW guidelines in a particular school created an inference of deliberate discrimination. The recent desegregation case of *Wright v. Council of Emporia*[110] offers some guidance, because the Supreme Court refused to permit the establishment of a separate school district even though the augmentation in segregative effect was only minimal. However, this case might be seen as merely an implementation of the duty to desegregate effectively, in that any *regressive* effect might have been disapproved.

In *Larry P v. Wilson Riles*, Judge Peckham articulated a primary reason for shifting the burden of proof in a school classification case as the presumptive invalidity of racial classification. Classifications based on race "must be scrutinized with particular care since they are contrary to our traditions and hence are constitutionally suspect."[111] A concomitant cause for special concern when state action disadvantages "politically defenseless minorities" is that for these groups "the judicial branch of government is often the only hope for redress of their legitimate grievances."[112]

The court in *Larry P* then gives as a second reason for shifting the burden of proof the positive duty of the school district to avoid racial imabalance.[113] *Swann v. Charlotte-Mecklenburg Board of Education* might well have been cited as authority for this proposition, since it accords extensive discretion to the district courts to fashion a decree enabling school districts to achieve "the greatest possible degree of actual desegregation."[114] Imposition of an affirmative duty to desegregate prompted the Supreme Court in *Swann* to presume an impermissible cause from the mere existence of racial imbalance and to resolve all uncertainties against the school board:

Where the school authority's proposed plan for conversion from a

108. *Id.* at 992.

109. 373 F.2d 836 (5th Cir.), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

110. 407 U.S. 451 (1972).

111. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See also* Loving v. Virginia, 388 U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).

112. Hobson v. Hansen, 269 F. Supp. 401, 513 (D.D.C. 1967).

113. Larry P. v. Riles, 343 F. Supp. 1306, 1316 (N.D. Cal. 1972).

114. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 701-02 (1971).

> dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.[115]

Judge Peckham embraces a third rationale for requiring defendants to justify their classification: statistical imbalance normally would not occur in the absence of racial discrimination. Analogizing from the employment discrimination cases, the court said:

> [T]hat for most unskilled or semi-skilled jobs, an ample pool of qualified or potentially qualified workers of both races exists; and if racial imbalance in the workforce nevertheless occurs, it is likely to be the consequence of racial discrimination. The analogous assumption in the instant case would be that there exists a random distribution among all races of the qualifications necessary to participate in regular as opposed to EMR classes. Since it does not seem to be disputed that the qualification for placement in regular classes is the innate ability to learn at the pace at which those classes proceed . . . such a random distribution can be expected if there is in turn a random distribution of these learning abilities among members of all races.[116]

Still another reason which might support shifting the burden, but which was not discussed by the court, is the traditional doctrine "that where facts pleaded by one party lie peculiarly in the knowledge of the adversary, the latter has the burden of proving it."[117] Once the statistical imbalance in the classroom composition is demonstrated, the information necessary to account for the racial discrepancy is almost exclusively within the defendant school district's office files. Hence, the party with the power to produce the fact should be called upon to respond with an explanation of the perceived difference.

Equal Education and the Schoolman's Burden—the Legal Vocabulary

For at least the last two decades, a dual standard of equal protection review has existed.[118] It is said that when a suspect classification is created,[119] or when a fundamental interest is infringed,[120] then the

115. 402 U.S. 1, 26 (1971).

116. Larry P. v. Riles, 343 F. Supp. 1306, 1316 (N.D. Cal. 1972).

117. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE fl 318 (1954).

118. *See Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1076 (1969).

119. *E.g.,* Graham v. Richardson, 403 U.S. 365 (1971); McLaughlin v. Florida, 379 U.S. 184 (1964).

120. *E.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942).

state must come forward to show that its action is required by a compelling state interest. Otherwise, the state need only advance a rational justification.[121] It has become increasingly clear that "suspect classification" and "fundamental interest" are words of art, more notable for the judicial reactions they cause than for their descriptive value.[122] There can be no doubt that education is fundamental. It is the central feature in the formative process of growing up; it is prerequisite to vocational, professional, and social achievement; it provides the primary workshop selected to fulfill this country's moral and philosophical commitment to racial equality. Yet only a short while after the California Supreme Court determined that education was a fundamental interest,[123] with quotation marks about the phrase and legal consequences attendant upon the conclusion, the United States Supreme Court determined that it was not.[124] Despite its conclusion, the Court went to great pains to reiterate the great importance of education in this society.[125] Thus, education remains unchallenged as a fundamental interest in all but the most artful sense, and the following statement from *Brown* loses none of its validity:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[126]

It cannot be seriously argued that education is only an ameliorative enterprise voluntarily undertaken by government where to insist on rigid parity of treatment "savors of the discredited notion that the state may not reform a particular evil without attacking all others of the same genus."[127] Education is not only "a right which must be made

121. Dandridge v. Williams, 397 U.S. 471 (1969); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

122. *See* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973).

123. Serrano v. Priest, 5 Cal. 3d 584, 589, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971).

124. San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973).

125. *Id.* at 29-30; *but see id.* at 35-37 for the implication that perhaps education still is a fundamental interest.

126. 347 U.S. 483, 493 (1954).

127. Goodman, *DeFacto Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 357 (1972).

available to all on equal terms"[128] but one which cannot be denied to all on equal terms. Though a municipality may close its swimming pools to avoid racial mixing,[129] it cannot close its public schools to avoid integration,[130] because public education is too important an enterprise of state and local government.

The universality of compulsory school attendance laws is not only a recognition by the states of the importance of education but a differentiation from other services which may or may not be provided. The required nature of school attendance assures its recipients a sustained and intensive contact with schooling during a major portion of their lives. Thus, aside from the relevancy of education to the attainment of other rights and privileges, it might well be seen as an end in itself. Education is asserted to have a significant role in shaping the emotional and psychological components of personality and as a major determinant of economic success. Despite the Supreme Court's recent retreat from simplistic categorization of schooling as a fundamental interest, we need not hesitate in asserting that it is "the *sina qua non* of useful existence."[131]

What also remains, without reservation, is the fact that classification by race is a suspect classification. The determination of the United States Supreme Court that education is not a "fundamental interest" is bound up in a judicial trend, at least at the top, away from the expanding role of the so-called New Equal Protection, with its dual standard of review. It is unlikely that we may see interests or classifications adjudged fundamental or suspect if they have not already been so declared. Yet it is altogether unlikely that any retreat will be made from the judiciary's total hostility to racial classifications.[132] Justice Harlan, long an opponent of the New Equal Protection, was consistent in his belief that, while the strict scrutiny compelling justification standard should be avoided in the interest of judicial restraint,[133] that standard *should* be applied to classifications based upon race.[134] In *Dandridge v. Williams*,[135] the Court refused to find welfare

128. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

129. *See* Palmer v. Thompson, 403 U.S. 217 (1971).

130. Griffin v. County School Bd., 377 U.S. 218 (1964).

131. Manjares v. Newton, 64 Cal. 2d 365, 375, 411 P.2d 901, 908, 49 Cal. Rptr. 805, 812 (1966).

132. *See* McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

133. Dandridge v. Williams, 397 U.S. 471, 489 (1969) (Harlan, J., concurring); Shapiro v. Thompson, 394 U.S. 618. 659 (1969) (Harlan, J., dissenting).

134. Shapiro v. Thompson, 394 U.S. 618, 659 (1969).

135. 397 U.S. 471 (1969).

subsistance payments to constitute a fundamental interest, and therefore refused to apply the strict scrutiny standard of review. The Court went out of its way, however, to state that no allegation was made that the state plan was "racially discriminatory [in] purpose *or effect.*"[136] Had it been so, the standard of review would have differed.

The legal conclusion can be drawn with certainty about racial isolation in the public schools: educational facilities segregated by race are inherently unequal and are therefore unacceptable. School officials might claim, for example, that it is educationally justifiable to assign black students to the same classes in order to avoid interracial strife, or to assign black teachers to teach black students on the ground that a better response might be achieved. While these reasons might appear "rational", they cannot suffice to justify segregation in the public schools so long as other alternatives are available to preserve racial peace or to promote the instructional function. Separation of racial or ethnic groups in our public schools cannot be tolerated unless there is both a compelling state interest and a convincing necessity to rely on the classification in order to effectuate that interest.[137]

Furthermore, where that racial separation results from purportedly neutral scholastic criteria, *Brown* and analogous race discrimination cases suggest that a court demand a similar justification. The school authorities must be able to show that use of their testing and tracking procedures are necessary to advance a compelling educational need, and that no less segregative alternatives exist which could meet that need.

Racially Neutral Criteria and Segregative Intent

Despite the inflexible certainty of considering the fundamentality of interests and the suspect nature of classifications in other instances of discrimination, the courts have struggled to define the nature of the school district's burden where the classification is not explicitly based on race. In *Larry P. v. Riles*[138] the district would "have a near impossible burden to sustain" if the classification were explicitly racial,[139] but characterizing the imbalance resulting from IQ tests as de facto

136. *Id.* at 485 n. 17 (emphasis added).

137. Brown v. Board of Educ., 347 U.S. 483 (1954). *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969); Levy v. Louisiana, 391 U.S. 68 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Griffin v. Illinois, 351 U.S. 12 (1956); Skinner v. Oklahoma, 316 U.S. 535 (1942).

138. 343 F. Supp. 1306 (N.D. Cal. 1972).

139. *Id.* at 1309.

segregative, the court required the defendants only to come forward with a "rational" justification.[140] The court in *Chance v. Board of Examiners*[141] found that examinations for supervisory positions in the school district had a prima facie discriminatory impact, but rejected the argument that the district's conduct should be treated as intentionally discriminatory.[142] Both courts, while ostensibly demanding a rational nexus between the examinations and what they purported to test, found in favor of the minority plaintiffs despite the school district's arguments that no better means of selection were available. Both applied a more exacting standard than normally associated with the rational justification test.[142A]

The reasoning of these cases rests on the premise that school authorities have a lesser constitutional responsibility when classroom imbalance results from the use of ostensibly neutral criteria rather than from an explicitly discriminatory policy. The conceptual approach is not only without precedent but is directly contrary to numerous Supreme Court cases in which the compelling interest standard was applied when a statute non discriminatory on its face proved grossly discriminatory in operation.[143]

In other areas of racial discrimination the application of seemingly neutral standards which result in the exclusion of particular racial groups has repeatedly been declared unconstitutional regardless of the superficial neutrality of such requirements. Thus, in *Labat v. Bennett*,[144] the exclusion of daily wage earners from juries—resulting in the elimination of black citizens—was held violative of the equal protection clause of the Fourteenth Amendment. As the Fifth Circuit aptly noted, "a benign and theoretically neutral principle loss its aura of sanctity when it fails to function neutrally."[145] Similarly, in *Greg-*

140. *Id.* at 1311.

141. 458 F.2d 1167 (2d Cir. 1972).

142. *See also* Armstead v. Starkville School Dist., 461 F.2d 276 (1972).

142a. As one commentator would describe it, the courts "found bite in the equal protection clause after voicing the traditionally toothless minimum scrutiny standard." Gunther, *A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972).

143. *E.g.*, Tate v. Short, 401 U.S. 395 (1971) (imprisonment for failure to pay a fine); Williams v. Illinois, 399 U.S. 235 (1970); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) (poll tax). As well, the California Supreme Court in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), struck down a school financial scheme which operated as an invidious discrimination against the poor by making the quality of education a function of wealth. The discrimination did not appear on the face of the statute.

144. 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

145. *Id.* at 724. *See also* Gaston County v. United States, 395 U.S. 285 (1969).

ory v. Litton Systems, Inc.,[146] the district court found that an apparently neutral employment policy of refusing to hire applicants with certain arrest records failed to function neutrally and was

> unlawful because it has the foreseeable effect of denying black applicants an equal opportunity for employment. . . . even if it appears, on its face, to be racially neutral, and its implementation has not been applied discriminatorily or unfairly as between applicants of different races.[147]

In cases particularly pertinent to the problem here, where the discriminatory impact results from a seemingly neutral test or other measure of competence—whether to perform adequately on a job[148] or to intelligently participate on a jury—[149] the lack of specific intent to discriminate cannot offset the grossly discriminatory results of the criteria or standard. As the Court stated in *Arrington v. Massachusetts Bay Transportation Authority*:[150]

> It is not enough that the factors producing the classification and the consequent inequality are themselves objectively neutral and without a background of even latent discriminatory purpose: when the effect is to deprive some citizens of rights that should be equally available to all, then there must be a compelling justification.[151]

If these decisions are logically applied to the public schools, the intentional use of a criterion for pupil selection and placement which is relevant[152] but which in fact produces a discriminatory impact, should suffice to require school authorities to step forward and present a compelling justification for the evaluatory device which they have chosen.

Nonetheless, some lower courts still consider whether the discrimination was intentional, although the question of intent is normally

146. 316 F. Supp. 401 (C.D. Cal. 1970).

147. *Id.* at 403 (citations omitted).

148. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

149. *See* Carmical v. Craven, 451 F.2d 399 (9th Cir. 1971).

150. 306 F. Supp. 1355 (D. Mass. 1969).

151. *Id.* at 1358, *accord*, Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1969).

152. The court in *Carmical* noted decisions such as Carter v. Jury Commission, 396 U.S. 320 (1970), and Turner v. Fouche, 396 U.S. 346 (1970), in which the Supreme Court approved the use of intelligence or education as legitimate criteria for jury service. But the state could not rely on screening devices, once a discriminatory effect was shown, unless they in fact measured what they purported to measure and unless no less discriminatory alternative was available.

irrelevant once a prima facie case is shown. Perhaps this is a form of recognition that testing and scholastic evaluation are central to the academic function, and perhaps it is done out of deference to the schoolman's special competence in the making of educational policy. Yet this approach evokes the fading jurisprudential philosophy with regard to de jure segregation; intentional acts are viewed as a prerequisite to the assignment of responsibility for the existence of racially disproportionate impact. The view is typically articulated in *Jones v. School Board*,[153] where the mere existence of racial imbalance was simply irrelevant when it resulted from the "fair application" of factors such as intelligence or scholastic attainment.

> What is decided is that the establishment of a school on non-racially motivated standards is not unconstitutional because it fortuitously results in all-Negro or all-white enrollment. The need for education under reasonble conditions supersedes the need for absolute integrated education under unreasonable conditions.[154]

Similarly, the Tenth Circuit held in *Keyes v. School District No. 1*[155] that racially imbalanced schools do not offend so long as the school district is not motivated by a purposeful desire to perpetuate and maintain racial segregation.[156] Courts taking this approach[157] in effect grant a presumption of administrative regularity to the school district, and require the plaintiffs to show intent. The appellate court asserted in *Keyes*:

153. 278 F.2d 72, 75 (4th Cir. 1960); *cf.* Monroe v. Board of Comm'rs, 244 F. Supp. 353, 365 (W.D. Tenn. 1965); Youngblood v. Board of Pub. Instruction, 230 F. Supp. 74, 76 (N.D. Fla. 1964).

154. Griggs v. Cook, 272 F. Supp. 163, 169 (N.D. Ga. 1967).

155. 445 F.2d 990 (10th Cir. 1971), *rev'd*, 93 S. Ct. 2686 (1973).

156. The result in *Keyes* is somewhat anomalous because the court found part of the school district segregated by intent, but the core city area racial isolation was determined to result from neighborhood patterns. Other cases have usually dealt with a school district as a unit and imposed a duty to desegregate the entire district on the basis of finding de jure segregation in some of the local schools. *E.g.*, Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972); United States v. School Dist. No. 151, 404 F.2d 1125 (7th Cir. 1968), *cert. denied*, 402 U.S. 943 (1971). Indeed, this was the primary basis upon which the Supreme Court reversed the Tenth Circuit's decision in *Keyes*. Mr. Justice Brennan, writing for the Court, emphasized that racially inspired school board actions normally have an impact beyond the particular schools which are subjects of those actions. Thus, the Court concluded that, unless the geographical structure of natural boundaries had the effect of dividing the district into separate, identifiable and unrelated units, proof of segregation in a substantial portion of the district suffices to support a finding of the existence of a dual system. 93 S. Ct. at 2695, 2697 (1973).

157. *See, e.g.*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 929 (1964). *But cf.* United States v. School District No. 151, 404 F.2d 1125 (7th Cir. 1968); Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 990 (1961).

> With the knowledge that we have said that neighborhood schools may be tolerated under the Constitution, it would be incongruous to require the Denver School Board to prove the non-existence of a secret, illicit, segregatory intent.[158]

This analysis may be superficially appealing because of the difficulty ostensibly imposed upon the school board to prove the nonexistence of unlawful intent. In light of school administrators' lack of direct responsibility for residential and demographic patterns, what more could be demonstrated of their good will? But consider the insurmountable evidentiary task if the plaintiffs were obliged to convince a court of the subjective ill will of governmental officials. Only school authorities who make the selection of school boundaries or of classificatory criteria and standards are in a position to demonstrate the legitimacy of their motives. In addition, given the evident difficulty of judicial exploration into the subjective domain of state officials, the Supreme Court, at least in cases of previously dual school systems, has preferred to avoid speculation into motive or purpose and to rest constitutional precepts on empirical analysis of the objective and tangible results.[159] The Court reaffirmed in *Alexander v. Louisiana*[160] its long standing position that "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion."[161]

In a recent decision of the Supreme Court regarding requirements of school desegregation, *Wright v. Council of the City of Emporia*,[162] the majority opinion emplicitly disapproved the dominant purpose test. Citing *Brown* and discussing other school desegregation cases, the Court concluded: "[A]n inquiry into the 'dominant' motivation of school authorities is as irrelevant as it is fruitless . . . . Thus, we have focused upon the effect—not the purpose or motivation —of a school board's action . . . . The existence of a permissible purpose cannot sustain an action that has an impermissible effect."[163]

158. 445 F.2d at 1005; *accord*, Gomperts v. Chase, 329 F. Supp. 1192 (N.D. Cal. 1971).

159. "[T]he purpose of the legislation was irrelevant, because the inevitable effect . . . abridged constitutional rights." United States v. O'Brien, 391 U.S. 367, 385 (1968). *Accord*, Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Palmer v. Thompson, 403 U.S. 217 (1971); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

160. 405 U.S. 631 (1972).

161. *Id.* at 632.

162. Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).

163. *Id.* at 451. This language is a bit difficult to reconcile with the majority opinion in *Keyes* which established a series of evidentiary presumptions in ascertaining segregatory intent. See the concurring opinion of Mr. Justice Powell in *Keyes*, accusing the Court of establishing a sectional double standard and asserting that the issue had

This approach is imperative in regard to testing and tracking because school classification decisions are rarely racially motivated. They are purportedly prompted by estimates of student ability or educational requirements, yet they consistently have significant and harmful consequences for the minority children who are isolated on the lower levels of the school spectrum. Moreover, the difference between deliberate discrimination and discrimination where racial motivation may be lacking seems insignificant when compared to the impact upon the children, who under either program suffer the same racial segregation in the classroom. The harmful effects of racial isolation are too similar in the north and south to support a different constitutional treatment. As Judge Wright said in *Hobson v. Hansen*: "[T]he arbitrary quality of thoughtlessness can be as disastrous and unfair . . . as the perversity of a willful scheme."[164]

It would be naive to ignore the omnipresent hostility of white majorities throughout this country to association with blacks—in schools, in classrooms or in residential neighborhoods. A separate rule for north and south is not only completely illogical, but there are strong moral imperatives for a nationally uniform constitutional consideration of school desegregation issues.[165] Continued application of a double standard would constitute an invidious sectional discrimination, rightfully and bitterly resented by a large segment of the southern community.

In *Swann v. Charlotte-Mecklenburg Board of Education*,[166] the Supreme Court did not reach the question "whether . . . school segregation [as] a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation . . . ."[167] But the implications for the north were clearly outlined because the seemingly innocent criteria held inadequate in this de jure system was the one most common in the north—assignment of students to schools on the basis of geographic proximity. The Court held that affirmative steps must be taken to assure that student bodies are no longer racially identifiable, and then clearly indicated that the burden was not discharged by a mere showing that school segregation

already been resolved in *Wright* that intent is "irrelevant." *See also* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972), for a discussion of the "thorny questions" which arise in proving racial motivation at trial.

164. 269 F. Supp. 401, 497 (D.D.C. 1967).

165. *See* Dimond, *School Segregation in the North: There is But One Constitution*, 7 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 1 (1972).

166. 402 U.S. 1 (1971).

167. *Id.* at 23.

resulted from segregated residential patterns. It was quite simply assumed that the undisputed existence of past discrimination partially caused the present segregated patterns.[168]

Just as the Courts have examined areas of school officials' discretion in assignment of pupils and teachers,[169] constructing and locating schools and attendance boundaries,[170] or enforcing transfer and zoning policies[171] to find de jure acts of discrimination in the north, so must they find in regard to tracking and classification practices.[172] If the objective fairness of assigning students on the basis of test scores or academic performance disappears for competing black students who previously attended inferior segregated schools in the South,[173] the same conclusion must be drawn with equal force in a northern urban district where in fact the schools and classrooms have been substantially segregated.[174]

Despite the widespread use of testing and tracking in American schools, there is very little consensus about its impact on the quality of education. The only certainty is that it produces racial segregation, yet its use continues. With full knowledge of the segregative consequences of the procedures, school authorities continue to categorize and separate. To perform an act with known consequences is to intend the consequences; this concept runs through the law. In the context of testing and tracking, then, the supposed dichotomy between de facto and de jure segregation is simply not important. Where school officials have for some time employed academic standards or testing devices in the classi-

168. *See generally* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971).

169. *See, e.g*, Davis v. School Dist., 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 433 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); United States v. School Dist. No. 151, 301 F. Supp. 2d 201 (N.D. Ill. 1969), *modified*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971).

170. *See, e.g.*, Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971); Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971).

171. *Id.*

172. *Cf.* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Spengler v. Pasadena Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

173. *See* Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd*, 456 F.2d 1285 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972).

174. Plaintiffs made this argument in *Berkelmen v. San Francisco Unified School District*, where in the earlier desegregation case of *Johnson v. San Francisco Unified School District*, the court had specifically found lower salary level reflecting lower level of teacher experience and larger class size in predominantly black schools. 339 F. Supp. at 1332-36. Furthermore, the most segregated black schools in *Johnson* obtained the lowest proportionate representation in the student body at the academically superior high school challenged in *Berkelmen*.

fication and assignment of pupils, and when the result has been a continuing and consistently disproportionate impact upon minority groups, discriminatory intent can be inferred from the natural, probable and foreseeable effect of perpetuating racially identifiable classrooms.[175] It is the school authorites who are imposing a segregated educational structure, and it is they who are mandated to change. As one commentator put it: "In every case of racially imbalanced schools sufficient responsibility can be ascribed to government to satisfy the requirement that stems from the equal protection clause's proscription of unequal treatment by government."[176] Indeed, unless we are to read *Swann* one way for previously de jure systems in the south and another for the equally segregated schools in the north, we are obliged to find that racial imbalance is itself a denial of equal protection.[177] Given the affirmative duty imposed in *Swann*, any school board which does not take all feasible steps to alleviate or eliminate classroom imbalance can be held responsible for its continuation.[178]

How Neutral Are the Tests?

To the extent school administrators employ devices which purport to test innate ability or scholastic aptitude, they will have a difficult time justifying a discriminatory result. To diagnose differences in intellectual endowment on the basis of performance on IQ tests is to assume that cultural differences and numerous other variables

175. *See* Bradley v. Milliken, 338 F. Supp. 582, 592 (E.D. Mich. 1971): "[P]roof that a pattern of racially segregated schools has existed for a considerable period of time amounts to a . . . racial classification by the state and its agencies, which must be justified by clear and convincing evidence." Davis v. School Dist., 309 F. Supp. 734 (E.D. Mich. 1970); *cf.* Wright v. Council of City of Emporia, 407 U.S. 451 (1972). *See also* Keyes v. School District No. 1, 93 S. Ct. 2686, 2700 (1973) (Mr. Justice Douglas, concurring).

176. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concept*, 78 HARV. L. REV. 564, 584 (1965) (footnote omitted).

177. This theory is apparently the basis of a number of decisions attacking racially discriminatory school programs. *See, e.g.*, Taylor v. Board of Educ., 249 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); Soria v. Oxnard School Dist., 328 F. Supp. 155 (C.D. Cal. 1971); Spengler v. Pasadena School Bd., 311 F. Supp. 501 (S.D. Cal. 1970); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967); Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964).

178. This reading of *Swann* was used to attribute responsibility to the Las Vegas School District despite some genuine attempts to integrate in Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972). However, in Copeland v. School Board of Portsmouth, 464 F.2d 932 (4th Cir. 1972), racially disproportionate impact did not suffice to require discontinuance of special programs. Rather than to require an "inflexible [rule of] racial balance" the court remanded for consideration of the reliability and relevance of the criteria used. *Id.* at 934.

have been effectively isolated. According to Dr. Jane Mercer, performance on the IQ tests might indicate greater mental capacity

> [i]f two persons have had an equal opportunity to learn certain types of cognitive, linguistic, and mathematical skills and to acquire certain types of information; if they are equally motivated to learn these skills and to acquire this information; if they were equally motivated to exert themselves in a test situation and equally familiar with the demands of the test situation; [and] if they were equally free of emotional . . . and biological . . . difficulties which might interfere with their performance . . . .[179]

Unfortunately, however, all these other factors are never equal, and probably cannot be made equal in a test situation. Beyond simple reflex acts and basic organic processes, few human attributes or behaviors are culture free. Among the many cultural differences which favor persons from the dominant culture in which the tests were developed are intrinsic interest in the test content, rapport with the examiner, drive to excel on the tests and past habits of solving problems individually or cooperatively.[180] The use of instruments like the WISC or Stanford-Binet in school classification decisions is especially invalid for minority children who rarely have the same opportunities to acquire the skills and attitudes required for successful performance.[181]

If our intent is to discover how much an examinee has learned in a particular area, such as a course in school, we select items which probe for the distinctive learning the school intended to impart. Normally, we label this an achievement test. If we wish to predict a child's success in school, we seek specific evidence of knowledge which bodes favorably for future academic performance. We call the test an aptitude or ability test, but we are still measuring only what was previously learned. It is the relevance of the learning we select for our investigation which determines who will succeed on the test. Hence,

179. Mercer, *Institutionalized Anglocentrism: Labeling Mental Retardates in the Public School*, in 5 RACE, CHANGE AND URBAN SOCIETY 311, 322 (P. Orleans & W. Ellis eds. 1971) [hereinafter cited as Mercer].

180. A. ANASTASI, PSYCHOLOGICAL TESTING 251 (3d ed. 1968). This is not to suggest that only cultural factors influence success on intelligence tests. A child may be tired, hungry or under emotional stress ona particular day and have trouble concentrating. He may have undetected problems in vision, hearing or other handicaps which interfere with his performance.

181. In psychological terms the test is not "objective" because it fails to isolate extraneous factors such as race or culture. *See, e.g.*, R. HURLEY, POVERTY AND MENTAL RETARDATION: A CASUAL RELATIONSHIP (1969); R. MASLAND, S. SARASON & T. GLADWIN, MENTAL SUBNORMALITY (1958); Neff, *Socio-economic Status and Intelligence: A Critical Survey*, 35 PSYCHOLOGICAL BULL. 727 (1938); Kagan, *The IQ Puzzle: What Are We Measuring?*, INEQUALITY IN EDUCATION, No. 14, 5-13 (1973).

whatever the label of the testing instrument, we cannot speak of innate ability unless we eliminate cultural variables in the previous learning experience.

Content is inevitably culturally oriented. For example one standardized test asks the child what he would do if he were sent to buy a loaf of bread and the grocer said he did not have any more. The only answer for which maximum credit is given is "I would go to another store." This response assumes a middle class urban or suburban environment with more than one grocery. A recent examination of a set of protocols on poor black children from a large city found that many answered "go home," which is a perfectly intelligent answer for which they were given no credit.[182] Similarly one of the plaintiffs in *Larry P.* received no credit for a picture arrangement until retested by a black psychologist who elicited an explanation perfectly logical according to the child's experience and environment.[183]

An even more obvious problem is the use of language which can seriously effect the extremely sensitive relationship of testor, testee and testing instruments. The "retarded" plaintiffs in *Diana* were subjected to perhaps the grossest kind of linguistic prejudice. Unfamiliar with any language other than Spanish, their mental capacity was evaluated on the basis of a test in English. One might argue that the school administrators whose judgment is so poor that they would rely on test results despite the insurmountable barrier to children not familiar with English, might themselves be diagnosed as deficient in ability.

It must be noted, however, that diagnosis of a child whose native tongue is other than English is just a more obvious and more narrow component of a whole host of language problems arising from cultural dissimilarity. Hence, translation of IQ tests into Spanish does not significantly diminish the failure rate of Latin American children. For instance, the test might call for the definition of a word of increasing rarity, or perhaps a word whose frequency is greater in one culture than in another. In *Larry P.*, for example, one of the children was unable to define "cushion," but received credit when the vocabulary item was changed to "pillow."[184]

182. Kagan, *The Concept of Intelligence*, THE HUMANIST, Jan./Feb. 1972, at 8.

183. Affidavit regarding evaluation of M.S., Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972). The child's picture arrangement showed a burglar escaping rather than being apprehended. No credit was given for that answer on the standardized test.

184. Affidavit regarding evaluation of J.L., Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *appeal docketed*, Civil No. 72-2509 (9th Cir., filed Aug. 28, 1972).

Still another source of error related to language occurs when a middle-class examiner administers the test to a child of a different linguistic background, who accordingly misunderstands the examiner's pronunciation.[185] Although this is not the only reason for variation in test results when the testor and testee are of different ethnic background, that factor remains a well documented variable in pupil performance.[186]

That language factors might cause failure on IQ tests was recognized by Judge Wright in *Hobson v. Hansen*:

> Verbalization tends to occur less frequently and often less intensively. Because of crowded living conditions, the noise level in the home may be quite high with the result that the child's auditory perception—his ability to discriminate among word sounds can be retarded.[187]

Group intelligence tests suffer the even greater liability of no contact with the testee by a psychologist or psychometrist trained to interpret individual variations in results. The grossly distorted results are simply recorded and subsequently utilized, despite the absence of an administrator to develop rapport, obtain cooperation, maintain the interest of the child, or to acquire background information essential to an accurate interpretation of the test results. In recognition of the minimal utility and unreliability of such tests, the California State Legislature passed two bills this year designed to restrict their use.[188]

185. Mercer, *supra* note 160, at 325. *See also* Watson, *IQ—The Racial Gap*, PSYCHOLOGY TODAY, Sept. 1972, at 48.

186. Dreger v. Miller, *Comparative Psychological Studies of Negroes and Whites in the United States*, 57 PSYCHOLOGICAL BULL. 361 (1960); Thomas, Hertzig, Drymen & Fernandez, *Examiner Effect in IQ Testing of Puerto-Rican Working-Class Children*, 45 AM. J. ORTHOPSYCHIATRY, 809-21 (1971). Upon retesting with the same instrument, the black psychologists attempted to eliminate factors of cultural bias, and the six children plaintiffs in *Larry P.* each scored 17-38 points higher than on their previously administered test. This result, while not necessarily proving superiority of methods on the retest, at least indicates a substantial variance in the result on the same test, depending on the race of the examiner, *i.e.*, the test is not "reliable" in psychometric terms. Similar results of retesting occurred in *Diana v. State Board of Education*, No. C-70-37 RFP (N.D. Cal. June 18, 1973) where Spanish-speaking children were retested in their native language by a Chicano psychologist. See affidavit of Steven Moreno, exhibit to plaintiffs' complaint.

187. Hobson v. Hansen, 269 F. Supp. 401, 481 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

188. Assembly Bill No. 665 sponsored by Assemblyman Leroy F. Greene was recently enacted into law and took effect in March 1973. It eliminates all state mandated group intelligence tests previously given in grades 6 and 12. A.B. 665 (1972). Assembly Bill No. 483 introduced by Assemblyman Willie Brown would have eliminated optional tests as well, but was vetoed by the Governor in July 1972. A.B. 483 (1972). Approximately 50 percent of local school districts continue to administer

Such remedial legislation, however, did not reach the inherent cultural bias which remains in individual testing.

All the tests currently in use in the public schools have been normed and standardized principally by testing members of the dominant culture. Both the Wechsler Intelligence Scale for Children and the Stanford Binet Test, the two most commonly used, were exclusively standardized on Anglo-American children. The Peabody Picture Vocabulary test was similarly standardized on a population of approximately 4000 white children in the area around Nashville, Tennessee. No mention is made in any standardization group of minority children. This omission is inexcusable in light of the culture-bound nature of examination content. These materials are used to measure comprehension, conceptual and perceptional skills yet they reflect primarily the culture in which the test was developed.[189] In Dr. Mercer's terms, the tests are "Anglocentric." As the Court found in *Hobson*:

> The evidence shows that the method by which track assignments are made depends essentially on standardized aptitude tests which, although given on a system-wide basis, are completely inappropriate for use with a large segment of the student body. Because the tests are standardized primarily on and are relevant to a white middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability.[190]

Courts will be very reluctant to accept currently used tests as culturally relevant and accurate indicators of natural ability. All the evidence points to these devices as seriously biased instruments which just about guarantee that white middle-class children will obtain the highest scores.

Absent a showing that the test is relevant to a minority child's cultural experience, reliance on the tests for significant educational decisions is in effect an operational acceptance of the notion that there are genetic differences in intelligence.[191] The court in *Larry P.*, having shifted the burden of proof to defendants, refused to assume any rela-

group aptitude tests, but this practice is being challenged in pending litigation. Ruiz v. State Bd. of Educ., Civil No. 218194 (Super. Ct., Sacramento, filed Dec. 16, 1971).

189. Mercer, *supra* note 179, at 325-27.

190. 269 F. Supp. at 514.

191. *See, e.g.*, Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1 (1969).

tionship between race and ability to learn unless proof were made to that effect.[192] The school district, although not embracing any notion of inherited differences in intelligence, did suggest a relationship between poverty, malnutrition and mental retardation. Without proof of the alleged connection, the court properly refused to take judicial notice of it, and instead assumed what our democratic principles mandate—that the ability to learn is spread randomly throughout the population.[193]

Race, Learning Ability and Morality in Public Education

In the employment area, where a purportedly neutral test operates to exclude disproportionately a racial group, use of the test is prohibited unless it can be shown to relate to job performance.[194] The measure of competence used in hiring must be validated; that is, it must have a known significant relationship to actual performance on the job. This relationship may be shown by an empirical comparison indicating a high degree of correlation between test scores of individuals and their on the job proficiency ratings. Alternatively, the device may be validiated by the "content-construct" method whereby sufficient information from job analysis demonstrates the relevance of the content or construct of the test.[195]

192. Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 695 (1968). Proof could be offered that racial discrepancies in IQ test scores indicate inherited differences in intellectual ability. *See, e.g.*, Herrnstein, *IQ*, ATLANTIC MONTHLY, Sept. 1971, at 43; Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1 (1969). But this assertion assumes the viability of the IQ tests as a measuring device, and can be countered by numerous other explanations of the performance gap. See Bernstein & Giacquinta, *Misunderstanding Compensatory Education*, 39 HARV. EDUC. REV. 587 (1969) for reactions to Jensen's article. *See also* discussion of the cultural bias of IQ tests in text accompanying notes 179-91 *supra*. In any case, for political reasons it is highly unlikely that school officials will urge a justification relying on genetic differences in intelligence, and even less likely that a court would accept such an argument.

193. Larry P. v. Riles, 343 F. Supp. 1306, 1310-11 (N.D. Cal. 1972). *See also* address by Jane R. Mercer, Pluralistic Diagnosis in the Evaluation of Black and Chicano Children, American Psychological Association, Washington, D.C., Sept. 3-7, 1971 (finding that with measurements of adaptive behavior and a cut off score of 69, rates of mental retardation were approximately equal among the various ethnic groups).

194. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

195, See discussion of validation in Western Addition Community Organization v. Alioto, 330 F. Supp. 536 (N.D. Cal. 1971), *rev'd on rehearing*, 340 F. Supp. 1351 (N.D. Cal. 1972). *See also* R. THORNDIKE & E. HAGEN, MEASUREMENT AND EVALUATION IN PSYCHOLOGY AND EDUCATION 616-41 (3d ed. 1969).

The educator's justification of scholastic aptitude or intelligence tests in the schools is comparable to validation in the area of employment. While admitting that the tests are not entirely appropriate indicators of the innate mental ability of minority children, school officials assert their utility as predictors of subsequent school performance.[196] Thus they contend that the real issue is abuse of the tests and not the instruments themeselves: "To abolish the tests while ignoring the fact that different students (and different classes of students) perform differently is about as sensible as the ancient Greek practice of slaying the messenger who brings bad news."[197]

The skills required to do well on standardized tests seem to resemble skills required to earn high grades in school. As Anastasi points out, slow work habits, emotional insecurity, low achievement drive, lack of interest in abstract problems and other culturally linked conditions which tend to lower test scores are also likely to handicap the individual in his educational and vocational programs.[198] Although the correlation between grades and test scores is far from perfect, and despite the myriad subjective variables which influence both results, there does seem to be a relationship.

The defect in the argument that test results predict school performance lies, however, in the cary-over effect or self-fulfilling prophecy. Reliance on the results of culturally biased tests may cause the same racial and ethnic bias to manifest itself later in the classroom. It brings us full cycle, back to Judge Wright's observation that "[t]he real tragedy of misjudgments about the disadvantaged student's abilities is . . . the likelihood that the student will act out that judgment and confirm it by achieving only at the expected level."[199]

One significant and specific tactic of the psychologists who retested "retarded" black children in *Larry P.* was reinforcement and encouragement to help the children overcome their chronic lack of

196. The predictive validity of such tests is not sufficiently high to justify such extensive reliance on test results. The correlation between test prediction and school performance is around .60. JENCKS, *supra* note 9, at 144. Chaney v. State Bar, 386 F.2d 962, 964 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968). *Chaney* held the California bar examination valid on its face because it tests "capacity to analyze . . . legal situations [and therefore] has a rational connection with the capacity to practice law . . . ."

197. David Kirp, "Schools as Sorters" unpublished paper, 1972, at 73.

198. A. ANASTASI, PSYCHOLOGICAL TESTING 466-92 (3d ed. 1968). *See also* Wesman, *Intelligent Testing*, 23 AM. PSYCHOLOGIST 267-79 (1968); J. CONANT, SLUMS AND SUBURBS (1961).

199. Hobson v. Hansen, 269 F. Supp. 401, 491 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

confidence.[200] The Court's findings credit this establishment of rapport, overcoming defeatism and early distraction, with the substantial improvement of these children's test performance.[201]

Another reason a simple employment test "validation" is inappropriate in the school context is the nature of what is being measured. The employer naturally desires the work force which will most competently perform on the job regardless of its racial composition. The definition of proficiency is relatively immutable, as are the ease of initial measurement and validation, when we want to determine whether someone is capable of painting a house, for example. Somewhat comparable in the school context is a test of a child's achievement or attainment in a particular subject such as arithmetic or reading. Even this task is beset by the infinite nuances and gradations in pinpointing the academic level. Measuring intelligence is in a completely different realm, both because of the immense moral and political overtones with which the very term is laden, and because intelligence can mean so many different things. To say that intelligence is what the tests measure, and that what the tests measure is important because intelligence is important, is to take the road which "leads through the looking glass." It would be equally logical to assume that intelligence is of no more consequence in human life than are scores on intelligence tests.[202]

Obviously, there are some inherited biological differences between races, such as eye color or hair texture. But these characteristics should entitle no one to any special favor. We might reconsider, then, the propriety of sorting children into stereotyped categories on the basis of fifteen point differences on tests which reflect no more than acquisition of the specialized vocabulary of the dominant culture. When children from low socioeconomic status or minority ethnic backgrounds consistently do more poorly on these tests, and when educators rely on a seriously biased instrument to sort, classify and label children in the public schools, are they not embracing a sort of genetic and cultural fatalism by making success on the tests a rite of passage to positions of power and wealth in the society?[203] Do they not make a *moral*

200. Affidavits of William Pierce, Harold Dent, and Gerald West, Bay Area Association of Black Psychologists, Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *appeal docketed*, Civil No. 72-2509 (9th Cir., filed Aug. 28, 1972).

201. 343 F. Supp. at 1306-07.

202. JENCKS, *supra* note 9, at 56-57.

203. *See, e.g.*, M. SCHWEBEL, WHO CAN BE EDUCATED? 75-76 (1968). Even a notable proponent of the concept of genetically conditioned differences in intelligence recognizes that equality of rights is a *moral axiom* which does not depend upon any

judgment to perpetuate and reinforce rather than to alleviate whatever cultural "disadvantages," i.e. differences, the minority child brought with him to the school.[204]

The Educator's Responsibility for Nonschool Factors

What is the significance of academic disparities which result not from prejudice in the schools, but instead from the individual plight of children from ghetto families? Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by his social, economic and cultural background, created and continued completely apart from any contribution by the school system. It is not doubted that children from poverty neighborhoods enter school in America less prepared than their middle-class counterparts in the essential skills of reading and arithmetic.

Perhaps we should not blithely exculpate school authorities from any responsibility, as some courts have.[205] Nevertheless, we must frankly reflect on the fairness of charging our educational institutions with the weighty burden of rectifying the results of long-standing and pervasive racial discrimination in the society at large. To what extent, then can the public school take the children as it finds them? Does the equal protection clause extend no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to others in the district? Is the equal protection clause not satisfied until the outcomes of schooling (e.g. pupil achievement, job attainment) offer no limit of the immense inequalities existing outside the schools?

The argument that the equal protection clause requires equal attainment at least for people of similar abilities[206] finds support in other

such differences, even if they could be scientifically proved. Jensen, *The Ethical Issues*, THE HUMANIST, Jan./Feb. 1972, at 5-6.

204. Achievement tests, at least, do not pretend to do what they cannot. They may well be a useful indicator of the acquisition of skills most important for getting a good job and for full participation in an increasingly technical world. *See* OFFICE OF EDUC., U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 20 (1966). But, again there is a moral concern in the use to which we put the test results. Do we attribute responsibility to the child and brand him an "academic failure" or do we ascribe the child's failure to a defect in the system and attempt to tailor the institutional program more to the child's educational and social needs?

205. *Cf.* Lau v. Nichols, 472 F.2d 909 (9th Cir. 1973) *cert. granted*, 93 S. Ct. 2786 (1973); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 60-61 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

206. *See, e.g.*, Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. REV. 1147, 1166-72

areas of the law where courts have required state officials to remove harmful inequalities even though state or local government was in no way initially responsible. The rights to vote[207] or to prosecute an appeal[208] are extremely tangible matters, however, which are more measurable than the concept of equal educational attainment. Enforcement of a judical remedy is difficult, if not impossible, when the goal is intangible.

Where racial segregation results from neutral neighborhood school assignments, courts have begun to pierce the transparent veil of even handed treatment.[209] In most of these cases, a theory of school responsibility was derived from acts by school officials which compounded the existing inequalities. In *Hobson v. Hansen* the court required a plan to include compensatory education for children in the residentially segregated inner city who had hitherto been denied the benefits of integrated education.[210] Similarly, in *United States v. Jefferson County Board of Education*, the court ordered the school district to "provide remedial education programs which permit students . . . who have previously attended segregated schools to overcome past inadequacies in their education."[211] This approach is merely an extension of the finding that the school district was responsible for the racial separation and of the assumption made in *Brown*[212] that segregation caused the achievement disparities. The "affirmative duty to take whatever steps might be necessary [to eliminate] racial segregation . . . root and branch"[213] also presumes that the school district's actions render it constitutionally liable for the existence of segregation.

(1966); Horowitz & Neistring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State*, 15 U.C.L.A. L. REV. 787 (1968); Kirp, *The Poor, the Schools, and Equal Protection*, 38 HARV. EDUC. REV. 635 (1968).

207. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

208. Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

209. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

210. 269 F. Supp. at 515.

211. 380 F.2d 385, 394 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

212. "'A sense of inferiority affects the motivation of a child to learn. Segregation . . . therefore, has a tendency to [retard] the educational and mental development of negro children . . . .'" Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

213. Green v. County School Bd., 391 U.S. 430, 437-38 (1968). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

Furthermore, educational research uniformly concludes that school resources and even racial composition are of almost negligible importance as predictors of achievement when compared to nonschool factors such as family background or community characteristics. As Dr. Coleman stated:

> [S]chools bring little influence to bear on a child's achievement that is independent of his background and general social context . . . . [T]his lack of an independent effect means that the inequalities imposed on children by their home, neighborhood, nad peer environment are carried along to become the inequalities with which they confront adult life at the end of school. For equality of educational opportunity through the schools must imply a strong effect of schools that is independent of the child's immediate social environment, and that strong independent effect is not present in American schools.[214]

This lack of independent effect may partially explain the unimpressive results of compensatory education programs designed to remedy cultural and racial disparities in school accomplishments. On the other hand, it may be premature to judge these programs, because the resources invested thus far have been of such small magnitude that they could not be expected to have more than an infinitesimal impact on the educational experiences of recipients.[215]

Seemingly, the schools cannot under any theoretical obligation of equal educational opportunity be made to remove entirely the impact of nonschool factors upon pupil achievement.[216] Nonetheless, the mandate to make a genuine attempt to alleviate such disparities is not diminished. A court cannot find from the comparative failure of minority children that they are somehow inferior. Rather, the persistent and undiminishing gaps between racial groups in academic success

214. OFFICE OF EDUC., U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 325 (1966).

215. *See* Cohen, *Defining Racial Equality in Education*, 16 U.C.L.A. L. REV. 255, 260-64 (1969).

216. In Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972), Judge Waddy ordered that no child be excluded from a regular public school unless the school board provide adequate alternative educational services "suited to the child's needs" which could include special education or tuition grants, and "a constitutionally adequate prior hearing, and periodic review of the child's status, progress, and the adequacy of any educational alternative." The district was required to provide "to each child of school age a free and suitably publicly supported education regardless of the degree of the child's mental, physical or emotional disability or impairment." (Memorandum Opinion pp. 24-26). In Pennsylvania Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971), the court held that notice and hearing must be afforded any allegedly mentally retarded child recommended for any fundamental change in educational status. Must the court administer the schools to enforce and implement these decisions?

must be viewed as a failure by school authorities. The underlying premise must be one of institutional responsibility and the underlying hope must be one for institutional reform. The very least we can demand, from the perspective of a moral and constitutional imperative, is that school officials not perpetuate the discriminatory effects of non-school factors. Yet this is precisely what they do when under the guise of homogeneous ability grouping, scientific testing instruments and special education classes, minority students are rank ordered and disproportionately relegated to the lowest strata of the school curriculum and hence to the bottom ranks of society.[217]

Remedial Measures Toward Racial Equality

The Methods of School Classification

Educators have begun to recognize that they can no longer continue to hide behind the indefensible and inexcusable use of culture-bound tests of intelligence for the classification of children in public schools. Hence, a number of efforts have been made to modify the instruments and the manner in which they are used.

In response to *Diana* and to the urging of psychologists, the California procedure was amended so as to require translation of tests into the native language of the testing subjects.[218] Such efforts have not met with success,[219] however, because of gaps in experience among different cultures. Even where alternate wording was utilized to adjust for culturally different meanings, additional problems arose in the clinical interpretation and use of the test results.[220] Similarly, because of the cultural bias in content, experiments in relying more heavily on performance portions rather than verbal parts of tests produced no significant change for black children.[221] Such modifications either fail

217. Walter Lippmann warned long ago about the genetic fatalism inherent in the use of these tests to create "an intellectual caste system." Lippmann, *The Abuse of the Tests*, 32 NEW REPUBLIC 297 (1922). *See also* M. SCHWEBEL, WHO CAN BE EDUCATED? 75 (1968).

218. CAL. ADM. CODE tit. 5, § 3401. See stipulated agreement in *Diana v. Board of Educ.* (settled June 18, 1973). *See also* Darcy, *Bilingualism and the Measurement of Intelligence: Review of a Decade of Research*, 103 J. GENETIC PSYCHOLOGY 259 (1963); Torrance, *Testing the Educational and Psychological Development of Students from Other Cultures and Subcultures*, 38 REV. OF EDUC. RESEARCH 71 (1968).

219. Moran, *Observations and Recommendations on the Puerto Rican Version of the Wechsler Intelligence Scale for Children*, 10 PEDAGOGIA 89 (1962). *See also* Mercer, *supra* note 179, at 324-38.

220. Coyle, *Another Alternate Wording on the WISC*, 16 PSYCHOLOGICAL REP. 1276 (1965).

221. Mercer, *supra* note 179, at 326-27.

to erase cultural variations or leave the evaluator without a normative framework from which he can interpret results.

Efforts might also be made to recruit and employ minority psychologists and psychometrists to conduct and interpret tests of minority children, but such efforts will prove fruitless in many areas because of the paucity of such people. Requirements of in-service training of personnel who administer tests, or who evaluate and place children in special classes, is also inadequate by itself to correct the problem, because the cultural background and experience of personnel is only one of many variables affecting test performance. Attempts to substantiate test results with adaptive behavior measures of a child's functional performance or with investigation of the child's home environment are not objective because conclusions might be affected by the school authorities' primary reliance on standardized tests.[222]

A better solution might be to use differential norms for different ethnic groups. This solution has been both attacked as reverse discrimination and advocated as necessary to compensate for past inequities. The nature of psychological testing makes it logically necessary, however to use different norms for different ethnic groups, since identical cut-off points are inherently discriminatory. The principle has long been established by the use of different norms on intelligence tests for boys and girls, by different height and weight limits for men and women, and by different actuarial mortality tables for life insurance on males and females, not to mention differential rates according to occupation and area of residence. Utilizing this kind of pluralistic evaluation, a child's intelligence would be evaluated only in relation to others who come from similar backgrounds and who have had approximately the same opportunity to acquire the skills necessary for success on the "Anglocentric" tests.[223]

Since the legal and moral justification for use of psychological tests is their presumed ability to predict performance, it would only be fair to predict as accurately as possible, that is, to use norms appropriate to each ethnic group. For the more widely used tests,

222. *See* Larry P. v. Riles, 343 F. Supp. 1306, 1311-12 (N.D. Cal. 1972).

223. Hence a Mexican-American child from an overcrowded Spanish speaking home in a rural area who scores only 75 on an IQ test would not be "intellectually subnormal" unless he scores in the lowest three percent of his own sociocultural group. Instead, he may be considered a person with normal learning ability who needs help in English as a second language. Such an educational diagnosis is manifestly different than one which labels him as retarded in intellectual development and incapable of acquiring any facility in intellectual matters. Mercer, *supra* note 179, at 334-36.

the development of separate norms for ethnic groups would be just as feasible as are the gender specific, residence specific and occupation specific norms for insurance purposes, assuming, of course, our willingness to accept highly imprecise delineation of cultural boundaries for particular groups.

A better solution, in light of the dubious validity of many intelligence or aptitude tests, is simply to return them to the womb of the laboratory for more adequate scientific gestation. An increasing number of psychological organizations, although defending the instruments themselves, have recognized the pervasive and abusive practices based on test results and have called for a moratorium on the use of such tests in identifying and classifying school children, at least until a more appropriate instrument might be developed.[224]

School officials might contend that the abolition of intelligence tests in the absence of any more suitable, currently available alternative is to burn down the barn to be rid of the mice. The argument that the tests pose an objective safeguard against overtly discriminatory school classification based on other factors must be evaluated in light of the distortive effects which the tests may have on the rest of the evaluatory process.

Although the use of intelligence and ability testing began as an effort to insure objectivity and to reduce the effects of individual prejudice and discrimination, the results are often just the opposite. As a recent review observes:

> Advocates of testing point to the objectivity of tests as a check against the personal prejudices of interviewers and hiring personnel. Tests, however, introduce their own element of racial bias, and their results can provide a smoke screen for those who wish to discriminate. An employer of seven hundred who selects applicants by interview and recommendations alone will find the absence of Negro workers harder to explain than one who can point to a record of poor test scores to explain Negro rejections.[225]

In a sense, IQ tests distort the process of referral screening and evaluation of children by removing the responsibility for racially unbalanced classes for the educable retarded from the consciences of

224. The President's Committee on Mental Retardation, The California Association of School Psychologists, and the Bay Area Association of Black Psychologists have all suggested such a moratorium. See discussion of A.B. 483 (1972), A.B. 665 (1972), in note 188 *supra*. A more appropriate measure might be one which takes sociocultural variables into account and considers how well a person functions in school or job, home, and community rules. *See, e.g.*, Mercer, *supra* note 179.

225. Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 744 (1968).

teachers and administrators. If teachers and administrators had to assign children to these classes on the basis of their personal, subjective experience with the children, they would have to bear the moral responsibility for finding a high proportion of black children unfit for normal classes, if they did so find. The IQ testing gives the teachers and administrators a chance to achieve the same result without acknowledging to themselves or to others that they are responsible for the outcome.[226] If the IQ tests were eliminated, and the assignment made a matter of teachers' recommendations plus parents' consent, the proportion of black EMR children probably would fall. Indeed, the teacher's decision to make the initial referral of a child as potentially retarded may be largely influenced by his low score on a group intelligence test, the teacher's consequent low expectation and the child's inevitable poor school performance.[227]

Furthermore, the IQ tests can be used to convince reluctant parents that their children are mentally retarded. Waiver of the child's interest cannot be competent if "scientific" test scores are overly impressive to unsophisticated parents.

The tests' distortive effects on pupil screening and evaluation are equally severe in the placement of children in classes for the gifted. The initial screening and referral of potentially gifted pupils relies heavily on group tests or in some cases on teacher recommendation. Teachers might be hesitatnt to recommend a student who has scored in the median range on the standardized group tests, and students might have a difficult time overcoming the test-created presumption that they are not so bright after all. Even those minority children eventually referred for psychological assessment are then administered the culturally biased individualized test which makes it highly unlikely that they will eventually be placed in the special class. Current California regulations permit some students to be enrolled in classes for the gifted even when they fail to score in the ninety-eighth percentile on individual tests, but the number is limited to a paltry 5 percent of the overall enrollment in such classes.[228]

Thus, the task of identifying academically talented or creative

226. Not only is the teacher relieved of responsibility by having "scientific" justification for differentiated educational programs, but the tests are perfectly consistent with the educators' demands for efficiency and smoothness in the operation of the public schools.

227. See notes 21-24 and 176, *supra* regarding the "self fulfilling prophecy" problem in public school.

228. CAL. ADM. CODE tit. 5, §§ 3821-22.

children, like that of selecting children with low learning potential, might be approached more objectively by school personnel whose views are not unduly influenced by results on tests which inaccurately purport to measure innate ability or aptitude. The distortive and prejudicial effects which such instruments have on the evaluative process generally dictates an immediate moratorium on their use as a device for tracking of any kind.

Achievement tests may contain the seeds of similar bias and distortion as much as the intelligence tests. They at least purport to measure only what has already been learned, and therefore do not beguile educators into placing the responsibility for "learning difficulties" squarely and solely on the child. The difference is between a finding that a child is inherently difficult to educate and a conclusion that he has not adequately mastered mathematics and needs help in that area. To the extent that standardized tests may legitimately be used, they must be diagnostic tools for ascertaining a child's educational need, and they must lead to prescriptive education with the school as an institution making strides to meet those specific urgent needs. If further information is needed regarding the psychological, physiological or neurological causes for a child's academic difficulties, assessment can be done without reliance on impersonal and culturally distorted standardized tests.[229]

Alternative means of screening and evaluating children for educational placements are possible. Certainly it would be of little use to be rid of the discriminatory tests, only to find school authorities perpetrating the same injury by utilizing more subjective factors. The screening process could be commenced with an evaluation by the classroom teacher utilizing a special checklist or even the more traditional tool of school evaluation—grades—and psychological interviews could be conducted without reliance on standardized intelligence or ability tests. The question is whether the use of such procedures would diminish the disproportionate impact of school classification?

A number of school districts have attempted to develop a checklist to help teachers, psychologists and counsellers identify pupils with creative potential for placement in the gifted classes. Such indicators are based largely on the research of Dr. E. Paul Torrance on char-

229. Some alternate possibilities of screening and evaluation of children for placement in retarded classes are suggested in Larry P. v. Riles, 343 F. Supp. 1306, 1313-14 (N.D. Cal. 1972). *See also* Findley, *How Ability Grouping Fails*, INEQUALITY IN EDUCATION, No. 14, 38-40 (1973).

acteristics of talented black children in Georgia and in Minneapolis.[230] One reason this method has not been entirely successful in reducing the disparity in representation in gifted classes is their use in conjunction with intelligence tests. In Oakland, for example, the checklist is utilized only for students who score well on group tests.[231] In San Francisco, where the standardized group measurements are no longer in use, the last step in the placement process is still administration of an individual test.[232]

These more traditional and accepted tools of school evaluation are subject to many of the defects inherent in standardized tests. Unless classroom teachers are provided a manual with specific standards for use of a checklist or for according grades, there will be little interjudge reliability. Checklist items as disparate as "has a tendency to lose awareness of time", "is an avid reader", "tends to dominate peers or situation" and "frequently interrupts others when they are talking" have highly uncertain relationship to learning potential. The identical personality function can indicate a bright student who is bored in the classroom or a rambunctious student who misbehaves in class in order to compensate for intellectual insecurity. The validity of such a measurement would be almost impossible to demonstrate. The defects in the use of such a checklist are equally apparent whether the checklist is used for identifying creative and talented youngsters or for identifying retarded children with learning difficulties.

Grades suffer from many of the same defects. They are influenced by a wide variety of factors other than performance. Whatever cultural objectivity may be asserted, the total subjectivity of grading standards would seem to negate the legitimacy and fairness of this criterion for estimating a child's potential. A certification system based on grades without reliance on standardized tests might disadvantage minority and lower class children even more.[233] Even a system based entirely on aspiration and free choice would still probably produce racially disparate educational and occupational attainment, if aspirations remained unchanged.[234]

230. Torrance, *Identifying the Creatively Gifted Among Economically and Culturally Disadvantaged Children*, 8 GIFTED CHILD Q. 171, 175 (1964).

231. OAKLAND UNIFIED SCHOOL DIST., APPLICATION FOR PRIOR APPROVAL OF PROGRAM FOR MENTALLY GIFTED MINORS, Appendix A (1972).

232. Affidavit of William B. Cummings, Director of Gifted Program, Johnson v. San Francisco Unified School Dist., Civil No. 70-1331 (N.D. Cal., filed Aug. 3, 1972).

233. Findley, *How Ability Grouping Fails*, INEQUALITY IN EDUCATION, No. 14, 38-41 (1973).

234. JENCKS, *supra* note 9, at 155-60.

This is not to say that all educational assessment of school children must be discarded as too subjective or insufficiently relevant. Academic assessment of pupils is central to any educational system, and the highly subjective element in that process is inevitable. On the other hand, we should not conclude that tracking practices as currently implemented in our public schools must remain because there is no way to eliminate educational disparities. What is needed is a system which guides and supports rather than strangles and distorts the academic development of individual school children.

The search for the most appropriate screening and measuring devices for all cultural groups is largely illusory, and so may be the ultimate goal of eliminating educational inequality. Nonetheless, our objective to desegregate classrooms should not be abandoned. The underlying premise of school desegregation transcends the intangible desire for equal educational opportunity. The real issue is whether racial groups will emerge from the schools, not only with differing credentials and attainments, but with an abiding sense of alienation and hostility toward each other. Whatever the means of screening and classification for academic purposes, it is the discriminatory impact which must be rectified. The primary task is to build a foundation which can withstand the tensions of racial diversity. The builder's tools may not lie in the educator's office but in the moral coffers of our Constitution.

The Lawyer As Handyman—Tools for Legal Solution

One approach focuses on the procedural rights of pupils assigned to less favored classifications. Procedural due process would require some form of hearing and impartial determination of fact whenever the school proposes to make a basic change in the child's educational status. Fairness would surely dictate prior notice and hearing when the child is removed from the mainstream of academic pursuits and placed in a program to which any stigmatizing label might attach.[235]

235. *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433 (1971), requiring hearing before names of alleged problem drinkers would be posted in taverns and package stores; Stewart v. Phillips, Civil No. 70-1199-F (D. Mass., filed Feb. 8, 1971). Many lawyers concerned with classification practices seek greater procedural safeguards as a way to focus attention and criticism on such practices, and because due process "is the likely winner in court." *See, e.g.*, McClung, *School Classification*, INEQUALITY IN EDUCATION No. 14, 17-37 (1973); D. Kirp, *Schools as Sorters*, paper to be published later this year in U. PA. L. REV. *See also* Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972), for an extensive and well-considered judicial mandate for appropriate procedures.

The requirement of even an informal hearing obviously would be too cumbersome for school adminstration if applied to the vast quantity of minute and quotidian classification or evaluation decisions. School officials will feel somewhat threatened when pupils and parents insist on access to school records or seek the benefit of advice and assistance from disinterested members of the community, not affiliated with the school district.

Moreover, when the school official's judgment is couched not in disciplinary terms but as a scholastic evaluation, and when there is no acknowledgement of potential inconsistency between the child's interest and that of the school, parents are likely ill-equipped to challenge the proposed assignment or even to recognize a possible misdiagnosis or stigma. Procedural requirements thus would mean not only the time-consuming task of rendering the academic decision comprehensible to the layman, but the possibility of challenge over a matter jealously guarded as the schoolman's special domain.

The appearance of due process may not only be a cruel hoax but also may make the classification itself more difficult to overturn. The ostensible process of careful administrative review of a decision to classify an individual child would appear to legitimize the substantive decision. Courts will be more likely to defer to the experts' determination when that decision was submitted to serious scrutiny at the school. Moreover, children will be substituting the inadequate ad hoc review of the accuracy of an individual assignment for the more sweeping and fundamental challenge to the propriety of the classificatory scheme.

Nonetheless, for school assignments of special or enduring significance to the child involved, whatever their supposed benefits, the very least that is warranted is a full discussion of its ramifications between family and school authorities. Given the impracticality of adversary procedures, a good substitute might be for an informal meeting where the school's analysis is explained and the parent must consent to the initial placement. Especially in cases where the child is placed in a class at the lower echelons of the school curriculum, there should be a carefully informed consent, guided by the normal legal principle of a "knowing intelligent and voluntary" waiver.[236] The parent also should retain the right to withdraw consent and revoke the placement at any time and for any reason.

236. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 399, 439 (1963); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

One obvious problem with this solution is the unlikelihood of meaningful consent. When a child is to be placed in a class for the retarded, for example, the parent ideally should be told the exact nature of the suggested assignment (no euphemisms), that the manner of selection may not be appropriate and may result in mislabeling the child, and that the classification will be noted in a permanent school record. It should also be explained that the choice is entirely up to the family, that no action will be taken against them if they refuse placement, and that they should consult with independent groups if they have any doubts.

Another consideration in making parental consent a prerequisite to placement is the independent interest of the child in his own education, which may conflict with his parents view.[237] A student dissatisfied with a determination by school officials further may be coerced by a consenting parent who tends to accept the "expert" advice of school authorities regarding what is best for the child's further academic progress.

Moreover, there must be substantial doubt that a requirement of consent can be a sufficient safeguard. Experience shows that ghetto parents rarely if ever contest a school placement decision. "They would feel incapable of arguing the point even if they were aware of it."[238] In *Larry P.*, despite the overwhelming imbalance in EMR classes and the resulting presumption of culturally erroneous classification, fewer than 2 percent of parents in the past two years have refused consent to the placement.[239] The mere requirement of consent cannot be viewed as an adequate remedy unless it in fact achieves classroom racial parity.

A much more controversial proposal is for the use of mathematical ratios to rectify past discrimination in the classification and assignment of school children to special programs or ability groups. *Swann v. Charlotte-Mecklenburg Board of Education*[240] places this kind of

237. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part) (recognizing child's independent interest); Chandler v. South Bend School Dist., Civil No. 71-5-51 (N.D. Ind. 1971); Prince v. Massachusetts, 321 U.S. 158, 165 (1944); United States v. Carolene Products, 304 U.S. 144, 153, n.4 (1938). See discussion of the special status of children in J. COONS, PRIVATE WEALTH AND PUBLIC EDUCATION 419-26 (1970).

238. THE PRESDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 241 (1967).

239. Answers to Interrogatories propounded by Plaintiffs, Feb. 6, 1973, at 3, no. 4, Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *appeal docketed*, Civil No. 72-2509 (9th Cir., filed Aug. 20, 1972).

240. 402 U.S. 1, 26 (1971).

remedy squarely within the discretion of the district court in dismantling segregated school systems. Although race is a forbidden criterion for assignment when used to promote segregation, it now appears perfectly acceptable when the goal is integration. A similar remedy was employed in *United States v. Montgomery County Board of Education*[241] to insure that the proportion of black and white teachers in the school district would be mirrored in each school. The doctrine finds further support in the area of employment where, for example, in *United States v. Iron Workers Local 86*[242] the Court of Appeals approved a district court decree ordering building construction unions to offer immediate job referrals until blacks comprised about 30 percent of union membership.[243]

Imposition of racial quotas in the area of employment or jury discrimination seems easy enough. We can assume that the job will be done with about the same efficiency no matter what the racial proportion among the employees. Just verdicts will presumably be rendered with regard to any criminal defendant, so long as members of his particular ethnic or racial group are not systematically excluded from representation on jury roles. But the ramifications of racial parity in the classrooms as well as in the public schools seem much more complex and unforeseeable.

The use of mathematical formulas would introduce the most arbitrary criterion of all into the school's selection and sorting process. How can we speak of diagnosing the special needs of individual school children and prescribing innovative programs to fulfill those needs, yet at the same time propose an unyielding numerical requirement? Ratios or quotas are surely less relevant than grades or even ability tests for scholastic purposes. Like the abolition of tracking itself, the imposition of statistical demands is heavy-handed and is a further restriction on an already overrestrictive system.

It would seem undesirable to convert the courts into glorified school boards, supervising the day-to-day administration of public ed-

241. 395 U.S. 225 (1969).

242. 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). *See also* United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir.), *cert. denied sub nom.*, Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967).

243. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971); Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970). In these cases similar ratio goals were utilized to remedy effects of past discrimination in employment.

ucation.[244] Whatever the fallibility of educators and their programs for disadvantaged children, we should not saddle the courts with school problems which they have even less competence to solve. Courts also have much less public accountability than do the educators for mistaken decisions.[245]

But judges are not obliged to provide a complete remedy; they need only to precipitate more appropriate action by school authorities in light of long standing constitutional principles.[246] Without undue interference in the educative process, they can simply tell school officials to stop violating constitutional rights, to desist from using irrational and culturally biased means of classifying children and to eliminate debilitating racial isolation in the classrooms. Given the vast array of less discriminatory alternatives, judges should not be reluctant to require school authorities to try them.

In light of the inevitably disproportionate affect of any classification system in the schools and the overriding imperative of achieving maximum social and racial integration, courts must be educated in the use of ratios which do not strangle the educational potential of the pupils. The Court in *Larry P.* was "particularly wary" of plaintiffs' proposal for racial quotas because of the possibility that white parents would refuse consent and thereby would reduce the number of placements available to black children who really are retarded.[247] The

244. Judicial conservatives have often expressed great reluctance to intrude in the daily operation of schools. *See, e.g.*, Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 515 (1969) (Black, J., dissenting); Minersville School Dist. v. Gobitis, 310 U.S. 586, 598-99 (1940). As the Chief Justice observed in *Yoder v. Wisconsin*: the judiciary is "ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." 406 U.S. 205, 235 (1972). This concern with the unenviable judicial task of "managing" the schools might seem especially warranted here given the minuteness and frequency of school evaluation and classification decisions as to each child, were it not for the overriding concern with the disproportionate racial impact of such decisions for school children generally. Given the existence of classroom segregation gross enough to be proved by statistics, the issues can be framed by attorneys in an intelligible manner and addressed by courts in manageable fashion. Classifications like ability grouping or placement in special classes are more highly visible, and are of longer duration and of greater significance than the grading of examinations or similar pupil evaluation. Obviously, the more important the consequences of the classification decision, the more appropriate it is for judicial review.

245. Bickel, *Shelly Wright's Sweeping Decision*, 157 NEW REPUBLIC, July 8, 1967, at 11-12.

246. Tigar, *In Defense of Shelly Wright*, 157 NEW REPUBLIC, Aug. 15, 1967, at 41-43.

247. Larry P. v. Riles, 343 F. Supp. 1306, 1315 (N.D. Cal. 1972). The court did not deny such requested relief but merely asserted that this and other remedies were inappropriate at this preliminary stage of the proceeding.

Court's concern should be mitigated by a showing of the rarity with which any parents deny consent to such a placement. A simple solution would be the computation of a more flexible ratio, allowing the district to adjust its requirements by the number of families who decline consent to the placement or who utilize private facilities instead. The Court's reservations would not be applicable to special education programs for especially bright, creative or highly motivated students where the objective of minority groups is to attain adequate proportionate representation.

The use of racial ratios, albeit somewhat arbitrary, offers the speediest solution to a fundamental institutional problem—the discriminatory segregation of minority children. The ratio can be justified as an essentially interim measure whose further utility will be obviated when more appropriate screening and selection criteria, which do not cause racial imbalance, are in use in the public schools. As such, it can be viewed as affirmative action to correct past discrimination, not an operating plan for perpetuity. As with any equitable remedy, school districts should not be required to take precipitous action, but should have a reasonable amount of time to achieve the constitutionally required racial balance. And perhaps most significantly, the end result should not be a rigid quota which might harm individual children or require complicated computations every time a new child was added or removed from a special class. Flexibility must be built into a judicial decree so as to best account for the divergent educational needs and aspirations of children regardless of their racial or ethnic background.[247A]

The educators themselves have begun to recognize that imposition of percentage goals may be the only effective means to diminish classroom segregation and to approach the objective of racial equality in education. The California Education Code now requires for special programs such as mentally gifted and educable mentally retarded a written explanation from school districts "if the percentage of children from any minority ethnic group in such classes varies by 15 percent or more from the percentage of such children in the district as a

247a. Strict quotas are unwise, since even random chance will inevitably result in some disproportion in all school classification. The prayer in *Larry P.* and the Court's order in *Diana* incorporate the desired flexibility by permitting any variance which is not "statistically significant," thus allowing for differing amounts of racial imbalance, depending on the size of a school district and the size of its minority population. The point at which variance in the representation of any group becomes "significant" under this formula is the point at which it can no longer be explained as merely the product of chance.

whole."[248] Lowell High School recently abandoned a geographic quota system designed to provide more representation from all portions of San Francisco.[249] Similarly abandoned was a flexible admissions policy for students designated as having ability and past achievement indicating a high degree of academic promise, but failing to meet the rigid admissions requirements.[250] Both geographic quota systems and flexible admissions policies to encourage cultural and racial distribution among student bodies are in frequent use by many colleges and universities.[251] Although unwilling to achieve racial parity in this manner, Lowell High School ironically continues to use a differential standard for evaluating male and female applicants for admission so as to avoid a disproportionate representation of women in the student body.[252] The use of a similar technique to achieve racial balance in the classroom certainly would be no less laudable.

Judicial reform of school classification practices may well evoke a re-examination of basic premises by school officials. Imposition of a constitutional mandate may impel schools to address more intelligently the subtle nuances of student ability and cultural diversity, and to treat them as a blessing rather than a burden. On the other hand, the dissolution of racial and socioeconomic concentrations of similar students in the same classrooms may augment the flight to the suburbs and to private schools. The unwillingness of school authorities to bear the mantle of educational equality may have a disastrous effect on the quality, even the very existence, of public education. Judicial en-

248. CAL. EDUC. CODE § 6902.095 (West Supp. 1973). Although exact statistical parity cannot be legally required, this particular "safeguard" seems highly inadequate. The suggested quota would, for example, permit a district where 10 percent of the elementary children are black to have up to 25 percent black children in classes for the retarded and none in the gifted program. Moreover, the smaller the ethnic group's representation in the district, the greater the allowable disparity. Finally, it should be noted that the "remedy" when such a continuing racial imbalance is reported is merely that further investigation may follow.

249. Answers to Plaintiff's Interrogatories, Record on Appeal at 180-224, Exhibit B, Berkelmen v. San Francisco Unified School Dist., Memorandum Opinion and Order of Summary Judgment, Dec. 19, 1972, *appeal docketed*, Civil No. 73-1686 (9th Cir., filed April 11, 1973).

250. *Id.*

251. *See, e.g.*, O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971); Reynoso, *La Raza, The Law and the Schools*, 1970 U. TOL. L. REV. 809, 827-31.

252. Answers to Plaintiff's Interrogatories, Record on Appeal at 180-224, Exhibits L and N, Berkelmen v. San Francisco Unified School Dist., Memorandum and Order of Summary Judgment, Dec. 19, 1972. *But see* Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972) (ruling differential norms by sex for admission to Boston Latin School a denial of equal protection).

forcement of equal educational opportunity must reach toward desirable social ramifications.

Judicial reform of school classification practices fulfills the same objectives as it does in decisions striking down school segregation. It may lead to a simmering truce or even engender widespread opposition. Nevertheless, in light of the tremendous strides in desegregating the public schools since *Brown,* we must conclude that judicial intervention against racial discrimination in the schools is appropriate. It crystallizes the issues and legitimizes the struggles in the legislature, in the community and in other political arenas. It fosters assent and compliance with constitutional requirements by creating a climate for fundamental changes in public education.[253]

Judge Wright addressed some of these important issues in his "parting word" to *Hobson v. Hans*en:

> It is regrettable, of course, that in deciding this case the court must act in an area so alien to its expertise. It would be far better for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept a responsibility to assist in the solution where constitutional rights hang in the balance. So it was in *Brown v. Board of Education* . . . So it is in the South, where federal courts are making brave attempts to implement the mandate of *Brown.* So it is here.[254]

In delineating the parameters of permissible school action, courts are ill equipped to administer the educational system. They cannot carry the candle, but they can kindle the flame of equality in educational opportunity. As law is normative of men's conduct, so social justice is normative of law.

253. *See* Kirp, *The Role of Law in Educational Policy,* 2 SOCIAL POLICY, Sept./Oct. 1971, at 42; Rostow, *The Democratic Character of Judicial Review,* 66 HARV. L. REV. 193, 208 (1952).

254. 269 F. Supp. 401, 481 (D.D.C. 1967), *aff'd sub nom.,* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). When the case was affirmed on appeal, three dissenting judges felt that the concerns expressed in the "parting word" should have controlled, and that these issues were not suitable for judicial resolution. *Id.* at 192-94.